134-614

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1182.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

EDDY WOODSON, A MINOR, BY HIS NEXT FRIEND, W. H. LEA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED JULY 25, 1889.

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1 To the Honorable the Chief Justice and associate justices of the Supreme Court of the United States:

The Louisville and Nashville Railroad Company, plaintiff in error, respectfully shows—

Statement of Case.

1st. On May 7th, 1887, Eddie Woodson, by his next friend, W. H. Lea, instituted an action at law against the plaintiff in error in the circuit court of Haywood county, Tenn., which came in the course of pleading to issues of fact to be tried by a jury.

Record, page —.

2nd. That on the 1st day of Feb'y, 1888, said cause was tried by a jury and a verdict for three thousand dollars rendered against the plaintiff in error.

Record, page —.

Which, upon motion of plaintiff in error, was set aside and a new trial granted "because not sustained by the evidence."

Record, page —.

3rd. That on the 24th day of April, 1888, another trial of cause was had in said circuit court and another verdict was rendered against the plaintiff in error for the sum of five thousand dollars.

Record, page —.

Which, upon motion of the plaintiff in error, was set aside and a new trial granted. In the language of the court, "The verdict of the jury is not supported by the evidence."

Record, page —.

4th. That on the 30th day of August, 1888, another trial of said cause was had in said court and a third verdict was ren-
2 dered by the jury against the plaintiff in error for the sum of three thousand dollars.

Record, page —.

Upon which plaintiff in error moved for a new trial, which was disallowed.

Record, page —.

From the judgment entered upon this verdict and disallowing the motion for a new trial the plaintiff in error carried the cause to the supreme court of Tennessee by an appeal in the nature of a writ of error.

5th. That on the 7th day of June, 1889, the supreme court of Tennessee, sitting at Jackson, for the western division of said State, affirmed the judgment of the lower court and rendered judgment against the plaintiff in error for the sum of three thousand dollars, interest and costs, by a judgment, in so far as it is now complained of, in the words and figures as follows, to wit:

"L. & N. R. R. Co.
vs.
"EDDIE WOODSON, by His Next Friend, W. H. LEA.
} No. 1. Haywood Law Docket.

This case was heard upon transcript of the record from the circuit court of Haywood county, and the court adjudges that there is no evidence to support the verdict of the jury; but the defendant having obtained three verdicts of separate juries upon different trials, two of which have been heretofore set aside by the circuit judge, and now alone upon this ground the statute of Tennessee forbidding the granting of more than 2 new trials in the same cause on the facts, which statute is not in conflict with the Constitution of the United States, 5th and 14th amendments, it
3 is considered by this court that said judgment be affirmed and that defendant in error, Eddie Woodson, by W. H. Lea, his next friend, recover of the plaintiff in error, The Louisville and Nashville Railroad Company, the sum of $3,000.00, amount of judgment of court below, and the costs of said court and of it and S. D. Chambers, surety on appeal bond, the further sum of $153.50, interest on said judgment from its rendition to this time, together with the costs of the appeal, for which let execution issue."

Record, page —.

6th. The statute of Tennessee referred to, in and upon which said judgment is based, is in the following language, to wit:

"Not more than two new trials shall be granted to the same party in an action at law or upon the trial by jury of an issue of fact in equity." Code of 1884, sec. 3835.

Assignments of Error.

The plaintiff in error respectfully assigns the following reasons why said judgment of the supreme court of Tennessee should be reversed and annulled:

1st. Because it appears by the record and upon the face of said judgment that plaintiff in error did not owe and was not liable to the defendant in error in any sum whatever under the pleadings and facts in this cause, and that the said judgment was coerced by reason of the existence of the statute of the State of Tennessee above set out and by the force of which alone, as recited in said judgment, it was rendered, and by which the plaintiff in error, if not
4 corrected, will be deprived of its property without due process of law.

2nd. Because the inforcement of said judgment will deprive the plaintiff in error of its property without due process of law, based alone upon the statute of the State of Tennessee above set out, which is opposed to and in violation of the 5th and 1st sections of the 14th amendments of the Constitution of the United States.

3rd. Because the effect of the statute of Tennessee above set out is to deprive the plaintiff in error, under the facts of this case, of its

property without due process of law, and the said statute was by the judgment herein of the supreme court of Tennessee held valid and not opposed to the 5th nor first section of the 14th amendments of the Constitution of the United States.

4th. Because the statute of the State of Tennessee above set out is an encroachment and usurpation by the legislative branch of the State of Tennessee upon the functions of the judicial branch of said State, and the enforcement of a judgment based alone upon said statute and not upon a judicial inquiry and judicial determination of the rights of the parties, but in direct opposition to the rights of the parties as ascertained by judicial investigation, as appears in this case, is to deprive the plaintiff in error of its property without due process of law.

5th. Because the statute of the State of Tennessee upon which said judgment is based is in violation of the nature and terms of the original social compact and beyond the limits of the nature and ends of legislative power, and is an apparent and flagrant abuse of such power, and therefore in violation of the Constitution of
5 the United States and null and void.

Whereupon the plaintiff in error humbly prays this honorable court to examine the errors assigned and to protect it against the deprivation of its property, and that said statute of the State of Tennessee be declared unconstitutional, null and void, and that the judgment rendered — this cause by the supreme court of Tennessee be reversed and the proper mandate be issued directing the supreme court of Tennessee to set aside said verdict and grant a new trial herein; and will ever pray.

ED. BAXTER AND McCORRY & BOND,
Of Counsel for The Louisville and Nashville Railroad Company, Plaintiff in Error.

6 [Endorsed:] Filed in my office July 9th, 1889. Jno. W. Buford, cl'k sup. court of Tenn. E., 40665.

7 *Fee Bond.*

Supreme Court of the United States. October Term, 1889.

Whereas lately, in a suit depending in the supreme court of the State of Tennessee for the western division, at Jackson, between The Louisville and Nashville Railroad Company, plaintiff in error, and Eddy Woodson, a minor, by W. H. Lea, his next friend, defendant in error, judgment was rendered against the said Louisville and Nashville Railroad Company, and the said company having obtained a writ of error to remove the said cause to the Supreme Court of the United States and filed a transcript of the record of said supreme court of Tennessee in said cause in the office of the clerk of the Supreme Court of the United States to reverse the judgment in the aforesaid suit:

Now, we, Henry W. McCorry, of Jackson, in the county of Madison and State of Tennessee, and Chester G. Bond, of Jackson, in the

county of Madison and State of Tennessee, undertake and bind ourselves to pay or cause to be paid to James H. McKinney, clerk of the Supreme Court of the United States, or his successors in office, all fees that shall accrue to him, the said clerk, and be charged to the said Louisville and Nashville Railroad Company in the prosecution of said writ of error.

Witness our hands and seals this 3d day of July, A. D. 1889.

HENRY W. McCORRY. [SEAL.]
CHESTER G. BOND. [SEAL.]

Signed and sealed in presence of—
M. B. GILMORE.

8 I, Thomas McCorry, deputy clerk of the circuit court of the United States for the western district of Tennessee, do hereby certify that the above-named obligors are known to me to be perfectly good and responsible for any costs that might accrue in said cause.

{Seal Circuit Court of the United States, Western District of Tennessee, Eastern Division.}

THOMAS McCORRY,
Deputy Clerk.

9 [Endorsed:] (7.) L. & M. R. R. Co., pl'ff in error, *vs.* Eddy Woodson, by W. H. Lea, next friend. Fee bond. Filed 3rd day of July, 1889. Jno. W. Buford, clerk supreme court of Tennessee, at Jackson.

10 *Bond on Error.*

Supreme Court of the United States.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
EDDY WOODSON, a Minor, by W. H. LEA, His Next Friend, Defendant in Error.

Know all men by these presents that we, the Louisville and Nashville Railroad Company, a corporation chartered by and organized under the laws of the State of Kentucky, with its chief office at Louisville, in said State, and John D. Taggart, of Louisville, Ky., and John A. Carter, of Louisville, Ky., are held and firmly bound unto Eddy Woodson, a minor, who sues by W. H. Lea, his next friend, in the full and just sum of six thousand dollars, to be paid to the said Eddy Woodson, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each one of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this 27 day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a session of the supreme court of the State of Tennessee for the western division, at Jackson, in a suit depending in said court between the said Louisville and Nashville Railroad Company, plaintiff in error, and Eddy Woodson, a minor, by his next friend, W. H. Lea, defendant in error, a final judgment was rendered on the 7th day of June, 1889, for three thousand dollars and costs against the said Louisville and Nashville *and Nashville* Railroad Company, and the said Louisville and Nashville Railroad Company, having obtained a writ of error in the Supreme Court of the United States to reverse the judgment rendered
11 in the above-entitled suit by the supreme court of the State of Tennessee, and having filed a copy of said writ of error in the clerk's office of the said supreme court of Tennessee for the western division, at Jackson, and having served a citation, directed to the said Eddy Woodson and his next friend, W. H. Lea, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, therefore, the condition of this obligation is such that if the said Louisville and Nashville Railroad Company shall prosecute said writ of error to effect and answer all costs and damages if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

[Seal Louisville and Nashville Railroad Co., Incorporated 1850.]

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
By M. H. SMITH, *Vice-President.*
JOHN D. TAGGART. [SEAL.]
JOHN A. CARTER. [SEAL.]

Attest: J. H. ELLIS, *Secretary.*

Sealed and delivered in the presence of—
SAM'L B. CRAIL,
B. D. WARFIELD.

I approve the above bond and the sufficiency of the sureties thereto.

P. TURNEY,
Chief Justice of the Supreme Court of Tennessee.

12 *Justification.*

UNITED STATES OF AMERICA,
District of Kentucky:

John D. Taggart and John A. Carter, the sureties on the above bond, with whom I am personally acquainted, being duly sworn, depose and say and each for himself saith that he is worth the sum of six thousand dollars over and above all his just debts and liabilities.

JOHN D. TAGGART.
JOHN A. CARTER.

Sworn to before me this 27 day of June, 1889.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

SAM'L B. CRAIL,
United States Commissioner and Clerk U. S. Cir. Court, Dist. of Ky.

13 [Endorsed:] (6.) L. & N. R. R. Co., pl'ff in error, *vs.* Eddy Woodson, by W. H. Lea, next friend. Bond on error. Filed 3rd day of July, 1889. Jno. W. Buford, clerk supreme court of Tennessee, at Jackson.

14 Original.

Citation to Supreme Court United States of America.

To Eddy Woodson, a minor, and W. H. Lea, his next friend:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee for the western division, at Jackson, wherein The Louisville and Nashville Railroad Company is plaintiff in error and you, Eddy Woodson, by next friend, W. H. Lea, are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville Weston Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

P. TURNEY,
Chief Justice of the Supreme Court of the State of Tennessee.

15 [Endorsed:] (4.) L. & N. R. R. Co., pl'ff in error, *vs.* Eddy Woodson, by W. H. Lea, next friend, def't in error. Citation. Issued 28 June, 1889. Came to hand 5th day of July, 1889, and executed 6th day of July, 1889, by delivering a true copy of the within to A. D. Bright, attorney of record in the above suit for Eddy Woodson, by his next friend, W. H. Lea. J. W. Brown, U. S. marshall western district of Tennessee.

1 service	2 00
41 miles	2 46
	$4 46

Paid by L. & N. R. R. Company. J. W. Brown, U. S. marshal. This July 6th, '89. Filed in my office July 9th, 1889. Jno. W. Buford, cl'k sup. court Tenn.

16 Original.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable chief justice and the honorable associate justices of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee for the western division, at Jackson, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between The Louisville and Nashville Railroad Company, plaintiff in error, and Eddy Woodson, a minor, by his next friend, W. H. Lea, defendant in error, wherein was drawn in question the validity of a statute of said State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such validity, a manifest error hath happened, to the great damage of the said Louisville and Nashville Railroad Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

17 Witness the Honorable Melville Weston Fuller, Chief Justice of the said Supreme Court, this 10th day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

{Seal Circuit Court of the United States, Western District of Tennessee, Eastern Division.}

JOHN B. CLOUGH,
Clerk of the Circuit Court of the United States for the Western District of Tennessee,
By THOMAS McCORRY,
Deputy Clerk.

Allowed by—
P. TURNEY,
Chief Justice of the Supreme Court of the State of Tennessee.

18 [Endorsed:] (2.) L. & N. R. R. Co., pl'ff in error, *vs.* Eddy Woodson, by W. H. Lea, next friend, def't in error. Original writ of error. Filed in my office 3rd day of July, 1889, & a true

copy left in my office. Jno. W. Buford, clerk supreme court of Tennessee, at Jackson.

19 *Petition for Writ of Error to State Court.*

To the Honorable Peter Turney, chief justice of the supreme court of the State of Tennessee:

The petition of the Louisville and Nashville Railroad Company, a corporation duly chartered by and organized under the laws of the State of Kentucky, respectfully shows that on the 7th day of June, 1889, the supreme court of the State of Tennessee, sitting for the western division, at Jackson, in said State, rendered a final judgment against your petitioner in a certain cause wherein Eddy Woodson, a minor, by his next friend, W. H. Lea, was defendant in error and your petitioner was plaintiff in error, for three thousand dollars and for costs, and awarded execution thereon, as will appear by reference to the records and proceedings in said cause; that said court is the highest court of law or equity in said State in which a decision in said suit could be had.

That there was drawn in question by your petitioner in said suit, in said court, the validity of a statute of said State, which is as follows, viz:

"Not more than two new trials shall be granted to the same party in an action at law or upon the trial by jury of an issue of fact in equity."

See Code of 1884, sec. 3835—that the validity of said statute was drawn in question by your petitioner, upon the ground of its being repugnant to the Constitution of the United States, and especially to the 5th and 14th amendments to said Constitution; and that the decision of said court was in favor of the validity of said statute.

Your petitioner complains that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid a manifest error hath happened to the great damage of your petitioner, as appears by the record of the proceedings in said suit, which
20 is herewith submitted.

Your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under sec. 709 of the Revised Statutes of the United States; wherefore your petitioner prays for the allowance of a writ of error and such other process as may cause said judgment to be corrected by the Supreme Court of the United States.

McCORRY & BOND,
ED. BAXTER,
Attorneys for Petitioner.

Allowed:
P. TURNEY,
Chief Justice of the Supreme Court of Tennessee.

21 [Endorsed:] (1.) L. & N. R. R. Co., pl'ff in error, *vs.* Eddy Woodson, by W. H. Lea, next friend. Petition for

writ of error. Filed 3rd day of July, 1889. Jno. W. Buford, clerk supreme court of Tennessee, at Jackson.

22 STATE OF TENNESSEE, *Haywood County,* } ss:

Be it remembered that at a term of the circuit court of Haywood county, Tennessee, begun and held at the court-house, in the city of Brownsville, in and for said county, on Monday, the 27th day of August, 1888, and the time appointed by law for the holding of said circuit court—present and presiding, the Hon. W. H. Swiggart, judge of said court, with W. M. Scott, sheriff, and B. L. Capell, clerk of said court—when the following proceedings were had, to wit:

Prosecution Bond. Filed May 7, 1887. *B. L. Capell, Clerk.*

23 Know all men by these presents that we, W. H. Lea, as next friend of Eddie Woodson, and I. K. Revelle and W. R. Leigh, as securities, are held and firmly bound unto the Louisville and Nashville Railroad Company in the sum of two hundred and fifty dollars; for the payment of which we bind ourselves, our heirs, etc., this the 7th day of May, 1887.

The conditions of the above obligation is such that the above-bound W. H. Lea, as next friend, etc., has this day commenced a suit in the circuit court of Haywood county, at Brownsville, against the said Louisville and Nashville Railroad Company: Now,

24 should the said W. H. Lea, as next friend, etc., prosecute his suit with effect and in case of failure therein pay to the said Louisville and Nashville Railroad Company all such damages and costs as may be at any time adjudged against them in consequence thereof and abide by and perform such judgment or decree as may be rendered by the court, then this obligation to be void; otherwise to remain in full force and virtue.

EDDIE WOODSON,
By His Next Friend, W. H. Lea.
IKE K. REVELLE.
W. R. LEIGH.

Summons. Issued May 7, 1887. *B. L. Capell, Clerk.*

STATE OF TENNESSEE, *Haywood County.* }

25 To the sheriff of Haywood county, Greeting:

Summons the Louisville and Nashville Railroad Company, if to be found in your county, to appear before the judge of the circuit court of Haywood county, at the court-house, in the city of Brownsville, on the 4th Monday in August next, then and there to answer the complaint of Eddie Woodson, by his next friend, W. H. Lea, in a plea of damages — twenty thousand ($20,000.00) dollars. Herein fail not, and have you then and there this writ. Witness B. L.

Capell, clerk of the circuit court, at office, in the city of Brownsville, this 4th Monday in April, 1887, and the one hundred and 11th year of American Independence.

B. L. CAPELL, *Clerk.*

26 Endorsement: Came to hand May 7th, 1887, and executed on the same day by reading the within summons to S. L. Chambers, depot agent of the defendant, Louisville and Nashville Railroad Company, at Brownsville, in Haywood county, Tennessee, he being the chief and principal officer of defendant in said county, and he having an office in said county, and citing defendant to appear before the circuit court of said county, at the court-house, in Brownsville, on the 4th Monday in August, 1887, as directed in said writ. T. E. Richardson, deputy sheriff.

27 *Declaration. Filed Aug.* 22, 1887. *B. L. Capell, Clerk.*

EDDIE WOODSON, by His Next Friend, W. H. LEA,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Pending in the circuit court of Haywood county, Tennessee. August term, 1887.

Plaintiff sues the defendant for twenty thousand ($20,000.00) dollars as damages done the plaintiff by the defendant on or about the 1st day of December, 1881, in the town of Brownsville, Haywood county, Tennessee, by and through the wrongful and tortuous acts and gross negligence of the defendant, which is a railroad company; and plaintiff avers that by and through and on account
28 of the wrongful and tortuous acts and gross negligence of the defendant he was run over by a freight train owned and operated on defendant's road and by said defendants, which said freight train greatly wounded and hurt the plaintiff and crushed and mangled the leg of the plaintiff and also mashed his other foot, thereby necessitating the amputation of one leg and the toes on the other foot, which physically disabled and disfigured the plaintiff for life; and plaintiff avers that said wounds and said injuries so done to him by the defendant caused him, the plaintiff, the most intense and excruciating bodily and mental sufferings, which have continued all the time since he received said
29 *said* injuries up to the present time, and do now exist.

And plaintiff avers that by reason of said injuries he has been wholly disabled and will be all his life; and that by reason of said injuries he has incurred many expenditures, such as medical bills and nursing, which otherwise would not have been necessary; and plaintiff avers that by reason of all the facts above set out he has been damaged by the defendant to the extent of twenty thousand dollars; therefore he brings this suit.

Plaintiff demands a jury of twelve men to try this cause.

REVELLE & LEIGH,
Att'y- for Plaintiff.

30 *Plea. Filed Aug.* 24, 1887. *B. L. Capell, Clerk.*

Circuit Court, Haywood County, Tennessee. Aug. Term, 1887.

EDDIE WOODSON, by His Next Friend, W. H. LEA,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

The defendant, for plea to the above-styled cause, says it is not guilty of the matters and things in the plaintiff's declaration alleged.

H. B. FOLK,
Att'y for Defendant.

Entries on the Minutes.

FEB'Y 1ST, 1888.

31 W. H. LEA, as Next Friend for EDDIE WOODSON,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Came the parties, by their attorneys, and came also a jury of good and lawful men, to wit, Henry Dodson, L. A. Thomas, J. H. Mann, Norman McKinnon, Robert Copley, J. M. Smoot, G. W. Bennett, W. L. Capelle, S. M. Mathews, H. C. May, N. T. Perkins, and W. H. McGill, who, being elected, tried, and sworn well and truly to try the issues joined in this case between the plaintiff and the defendant and a true verdict render according to the law and the evidence, *who*, upon their oaths aforesaid, do say that they find the issues joined in this case in favor of the plaintiff, and say the defendant
32 is guilty of the matters alleged in the plaintiff's declaration, and the said jury assess the plaintiff's damages therefor at three thousand dollars. It is therefore considered by the court that the plaintiff, W. H. Lea, as next friend, etc., recover of the defendants, The Louisville and Nashville Railroad Company, the sum of three thousand dollars, the amount so found by the jury, and the costs of this cause, for which let execution issue; and thereupon the defendant, by attorney, moved the court to grant it a new trial herein, which motion, after argument of counsel thereon and being seen and understood by the court, the same is allowed and a
33 new trial is hereby granted the defendant herein, and the verdict of the jury aforesaid is by the court set aside and for naught held because not sustained by the evidence, and this cause is continued until the next term of this court and is set for trial on the first day of the next term of this court.

APRIL 24TH, 1888.

W. H. LEA, as Next Friend for EDDIE WOODSON,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Came the parties, by their attorneys, and came also a jury of good

and lawful men, to wit, T. J. Goforth, Ovid Walker, Allen
34 Snipes, Tom Tucker, Bill Holmes, W. T. Rice, Jr., Mose White, Jacob Scott, Jerry Scott, J. B. Boothe, and Thomas Ware and R. N. Simmons, who, being elected, tried, and sworn well and truly to try the issues joined in this case between the plaintiff and the defendant, and a true verdict render according to the law and the evidence, *who*, upon their oaths aforesaid, do say that they find the issues joined in this case in favor of the plaintiff, and say the defendant is guilty of the matters alleged in the plaintiff's declaration, and the said jury assess the plaintiff's damages therefor at five thousand dollars. It is therefore considered by the court that the plaintiff, W. H. Lea, as next friend of Eddie Woodson,
35 recover of the defendant, The Louisville and Nashville Railroad Company, the sum of five thousand dollars, the amount so found by the jury, and the costs of this cause, for which let execution issue; and thereupon the defendant, by attorney, moved the court to grant it a new trial herein, which motion is continued over for argument until some future day of the present term of this court.

MAY 3D, 1888.

EDDIE WOODSON, by His Next Friend, W. H. LEA,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Came the parties, by their attorneys, and on argument the
36 defendant's motion for a new trial is granted by the court, and the verdict of the jury is set aside and for nothing held because the verdict of the jury is not supported by the evidence. To the judgment of the court in granting the defendant a new trial the plaintiff except-. The plaintiff moved the court to tax the defendant with all the costs accrued herein on granting the defendant a new trial; which motion is by the court disallowed, to which plaintiff excepts. The plaintiffs tendered his bill of exceptions to the judgment of the court in allowing the defendant's motion for a new trial herein and granting the defendant a new trial
37 herein because the verdict of the jury is not supported by the evidence and to the judgment of the court in overruling plaintiff's motion to tax the defendant with all accrued costs herein on granting the defendants a new trial; which being signed and sealed by the court is ordered to be made a part of the record in this case; and thereupon this cause is continued until the next term of this court and set for trial on the first Wednesday of the term.

AUGUST 30TH, 1888.

EDDIE WOODSON, by His Next Friend, W. H. LEA,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

38 Came the parties, by their attorneys, and came also a jury of good and lawful men, to wit, N. J. Stewart, Geo. Gordon, James Joyner, T. R. Currie, W. S. Shinault, E. E. Walker, Richard

Cozart, W. L. Anthony, William Mitchell, Robert Thornton, Paul Jones, J. C. Covington, who, being elected, tried, and sworn well and truly to try the issues joined in this case between the plaintiff and the defendant and a true verdict render according to the law and the evidence, *who*, upon their oaths aforesaid, do say that they find the issues joined in this case in favor of the plaintiff, and say that the defendant is guilty of the matters alleged in the plain-
39 tiff- declaration; and the said jury assess the plaintiff's damages therefor at three thousand dollars. It is therefore considered by the — that the plaintiff, Eddie Woodson, by W. H. Lea, as next friend, etc., to recover of defendant, The Louisville and Nashville Railroad Company, the sum of three thousand dollars, the amount so found by the jury, and the costs of this cause, for which let execution issue, the money to be paid to the guardian of the plaintiff, Eddie Woodson, when he shall execute bond, with good security, for the same as required by law.

AUGUST 31ST, 1888.

W. H. LEA, Next Friend, etc., of EDDIE WOODSON,
40 *vs.*
L. & N. R. R. COMPANY.

On motion of A. D. Bright, Leigh & Revelle, and D. A. Nunn, att'ys of record for plaintiff, a lien is hereby declared by the court on the judgment recovered herein for their reasonable attorneys' fees for the prosecution of this suit and recovery of the judgment herein.

SEPTEMBER 1ST, 1888.

W. H. LEA, Next Friend of EDDIE WOODSON,
vs.
L. & N. R. R. COMPANY.

In this cause, on this the 31st day of August, 1888, the de-
41 fendant moved the court to grant it a new trial herein and to arrest the judgment herein because the verdict of the jury, returned herein Aug. 30, 1888, was not supported by the law and the evidence submitted, and because of error in his honor the trial judge in allowing plaintiff to make proof of others than the plaintiff swinging onto trains at other times prior to the day of the accident, and of the habit of plaintiff and other boys in swinging to moving trains prior to the day of the accident; which motions are by the court seen and understood, and the same are by the court overruled and disallowed. Thereupon the defendant presented its bill of exceptions to the ruling of the court in overruling its motions
42 aforesaid and in overruling its objection to the admission of the testimony aforesaid in the progress of the trial; which bill of exceptions is signed by the court and ordered to be made part of the record herein; and thereupon defendant prayed an appeal to the next term of the supreme court of Tennessee, at Jackson, which is granted upon the defendant giving bond and security in the sum of two hundred and fifty dollars to pay the costs incident to the said

appeal, and thereupon the defendant entered into bond, with H. B. Folk and S. L. Chambers as securities, in the sum of $250.00 to cover the costs incident to said appeal, conditioned as required by
43 law; which appeal bond is by the court approved and the appeal granted.

Bill of Exceptions. Filed Sept. 1st, 1888. B. L. Capell, Clerk.

On the trial of this case at the August term, 1888, of the circuit court of Haywood county the following evidence was submitted to the jury:

Witnesses for Plaintiff.

1st. EDDIE WOODSON, witness for the plaintiff, testified as follows:

I am the plaintiff; am 13 years old. I was six years old when I got hurt. I don't know what year I got hurt. I think it
44 was in 1881. I was hurt or injured in Brownsville, Tennessee, by defendant railroad company, by freight train of defendant's running over my left leg and toes of my right foot except the little toe. I was trying to swing the train when I got hurt. It was a freight train going west towards Memphis from Brownsville. It was in the evening. I was trying to catch on to the train. I was running along by side of train; had not caught hold of the train when my foot struck against a sta-b or post, and I was thrown down and my left leg thrown under the train. I tried to push it out with other foot and that foot was caught under wheel of car and crushed. My left leg was crushed and all the toes on right
45 foot except the little toe was crushed by wheel of one of the cars. Dr. John Allen and Dr. W. W. Taylor amputated my leg and toes. My leg was amputated just below the knee. I suffered very much; was confined to my room about two months from the injury. The staub was called a clearance post. Don't know whether it was used by railroad company as a clearance post or not. It was taken up awhile after I was hurt. It was in the day-time when I was hurt. It was in the evening. We boys were in the habit of swinging the trains whenever we wanted to. It was customary and common for us to ride on or swing the trains whenever we wanted to. I was in the habit of riding on the trains
46 at Brownsville, Tennessee, when I wanted to, and so were the other boys. The conductors and brakesmen and railroad officials at Brownsville knew it; they could see us. I did not see any of the brakesmen when I was trying to get on the train when I was hurt. I was on the north side of the train. The brakesmen would let us ride and some of them would tell us not to let the conductor know it. The brakesmen were on top of train when I was hurt. I did not see them and don't know if they saw me. Train was going pretty fast when I was hurt. No one gave me permission to ride on the train the day I was hurt. Some of the con-
47 ductors and brakesmen would try to keep us from riding on the trains, others would not. Some of the boys would help the railroad men switch the cars by getting on the trains and put-

ting down the brakes. Don't remember if Judge Lea or Mr. McLaughlin, the agent at the depot, tried to keep me off of the train or that Mr. Holbrook took me off the "caboose car" the day I was hurt. My mother told me I ought not to go down to the trains and railroad; but I went. I have seen Frank Keely, Maud Keely, and other boys putting down brakes; don't know how old they are. Maud Keely, Frank Keely, Will Griffin, and other boys were riding on the train the day I got hurt. I was hurt near where Mrs.
48 Owry lives. Mr. Williams lived there then. Will Meux, a colored boy, now dead, cut off my boot from my foot the day I was hurt. My mother did not tell me I might ride on the train; she did not know it. McLaughlin, the depot agent, would sometimes chunk the boys off of the trains. The conductor never gave me permission to ride the day I got hurt. I don't know whether he saw me or not. I do not know how to read or write. I did not see any warning notice put up at the depot; no one read it to me or told me about it. Don't remember that when I lived in Brinkley, Arkansas, that I tried to climb on or swing to railroad trains.

The defendant objected to the testimony introduced above
49 of above witness at the time, and to questions of plaintiff leading to such testimony of other boys swinging to trains at other times prior to the accident, and of this by swinging to trains other times prior to the one by which and at the time where he was hurt. The objection was overruled and defendant excepted.

MAUD KEELY, witness for plaintiff, deposed as follows:

I am 14 years old; was born here in Brownsville; have been here ever since. I know the plaintiff, Eddie Woodson; have known him for some time. Know about his getting hurt; don't know how long ago it was. Have been in the habit of swinging trains
50 and riding on them. The plaintiff was in the habit of swinging trains and riding on them whenever we wanted to. The conductors and brakemen and railroad men at the depot all knew we were in the habit of doing so. I have been swinging trains since I was 4 years old. About 20 of us boys, plaintiff among the number, were in the habit of swinging or riding on the trains. We would ride the cars in on the switch and help stop them by putting down the brakes. The boys would fight among themselves to get to "brake." All wanted to put down the brakes. The larger boys would try to take brakes away from the smaller ones. This riding and swinging on the trains was done before plaintiff
51 was hurt. I was on the train swinging when plaintiff got hurt. The conductor and brakesmen knew we were on there. I did not see plaintiff when he got hurt. When I saw him he had hold of the sliding of the cars trying to swing to it. I saw a staub there close to where he got hurt; it was down near the lower switch. It was taken up about a week after he got hurt.

Will Meux (now dead) cut his boot off. Don't know who removed him. He seemed to suffer a great deal. I used to give the conductor and brakesmen apples to let me ride. Boys used to go

to Bell's depot on the trains. They never objected to us riding. They would get mad sometimes because we would not give
52 them apples, and would paddle us. The trainmen would throw coal at us sometimes. We gave them apples before plaintiff got hurt. He got hurt in the winter time, in the evening about 2 or 3 o'clock. The train was going to Memphis. Mike Grady was conductor; train stopped at Brownsville to fix hot box and put off freight; accident happened on north side of track; don't know on which side of track they were fixing hot box; don't know if the crew of the train saw us or not. There were 8 or 10 of us boys there. Eddy had hold of door-slide, running along on the ground with the train. I don't know whether or not trainmen saw him; have seen boys on the trains fighting for brakes; don't
53 think the notice of warning was up when Eddie got hurt; don't think it was. The staub was a clearance staub, used by the railroad to show the main track was clear. Eddie got hurt a little on the other side of Mr. Williams' house on track. The post was on other side of Williams' house, near where Eddie got hurt; don't know whether Eddie stumbled over post or not. Charlie Waddle, a former conductor on the road, took apples from us to let us ride. He is now on Iron Mountain road. I think I have given Mike Grady apples to let us ride; did not see any apples the day Eddie got hurt. No apples were given the day he got hurt. The conductors—don't recollect names—and the brakesmen used
54 to paddle us because we did not give them apples. This was before Eddie was hurt—about two months before he was hurt; don't know whether they were winter or summer apples.

Dr. JOHN ALLEN, witness for plaintiff, deposed as follows:

I am a practicing physician and surgeon; know plaintiff and know when he was hurt. It was in December, 1881. Dr. Taylor and myself amputated his leg and toes off of foot. I administered the ether while Dr. Taylor cut off his leg and toes. He amputated the left leg below the knee and all the toes on the right foot except the little toe. I attended him for 2 months. He seemed
55 to suffer very much. It was necessary to amputate his leg and toes. They were badly mangled. The life expectancy of plaintiff is 31 years from the time injured. He was a stout, healthful boy. He is not incapacitated by reason of his injuries from earning a living. He could do such work as harness-making, shoe-making, etc., but by reason of his injuries could not engage in many kinds of work. It did not help or aid him in making a living by being injured.

WILL NIXON, witness for plaintiff, deposed as follows:

Know plaintiff. He was in the habit of riding on the trains at the depot here in Brownsville; saw him the day he was
56 hurt. I was in about 10 yards of him. I was doing nothing. He was swinging on train when hurt, and made a misslick, I reckon; had hold of hand-hold on step-ladder; was hurt by freight

train on railroad in Brownsville. The boys, Eddie and others, before he was hurt were in the habit of swinging the trains; the conductor and brakesmen knew they were doing it. I did not help take him up, but was present. I don't know when he was hurt; it was in the fall of the year, about 2 or 3 o'clock in the evening. He had been on trains and was trying to get on again when he got hurt; he was on north side of train towards Brownsville; train had stopped at Brownsville to fix hot box; don't know who was conductor
57 and brakesmen on train that day; was about 20 feet from Eddie when he got hurt. The boys were on the train when it pulled out the day Eddie was hurt. I did not see the trainmen; don't — where they were; don't think any of them saw Eddie on the train the time he got hurt. Some of the trainmen on railroad would try to keep the boys off and some would not hinder them; some of the trainmen would take apples from the boys to let them ride; don't know that any apples were given the day Eddie was hurt. I saw Mr. McLaughlin, depot agent, trying to keep them off trains; he got after them whenever he got a chance at them.

58 FRANK KEELY, witness for plaintiff, deposed as follows:

I was at depot time plaintiff was hurt; I was on hind end of train, swinging trains. Saw Eddie when he went to jump on and his leg went under the train. There was a staub there, but I don't know where it was at; it was pretty close to where he got hurt. I was too far off to see if he got hurt by staub or not. Some boys were on the train at "caboose;" conductor could have seen them if he had looked, so could brakesmen. All trainsmen knew that the boys were in the habit of swinging the trains. A colored boy cut his boot off. Will. Thomas and Will. Griffin were there. I don't
59 know whether any of the railroad men went to him when he was hurt; did not see Mr. McLaughlin there. This was a freight train going to Memphis; it never stopped after it ran over him. Conductors and brakesmen did not tell me I might ride; train men did not try to keep me off of trains; don't know how long ago it was. The caboose was behind the train. When I got off the caboose was crossing the street at depot. Eddie was on train near engine. We were all on side of train next to Brownsville. I think there was one man in caboose; don't know whether he was a railroad man or not. Mike Grady was conductor; he was on top of train; don't know whether he saw Eddie or myself that
60 day. Eddie was hurt near Baxter's Mill. The staub was taken up about a week after Eddie was hurt.

W. W. DUPREE, witness for plaintiff, deposed as follows:

I know Eddie Woodson. I was cotton weigher in Brownsville, at depot, from 1877 to 1887. I don't know whether I saw Woodson day he was hurt or not; didn't know him then. The railroad men must have known the boys were in the habit of swinging the trains. They could not help seeing them, as they were at it every day. I saw crowds of boys swinging the trains most every day before Ed-

die was hurt. Railroad men could have seen then unless
61 they just shut their eyes. I have often heard McLaughlin, the agent at the depot, warn the boys off the trains; don't remember that I ever heard any conductor or break-smen warn them off; never noticed that they did. I was on the cotton platform most of the time and could not see them; saw printed warning stuck up at passenger and freight depot warning all persons, men and boys, from getting on train while in motion; don't think there was any corporation in Brownsville when Woodson got hurt.

J. K. HUTCHINSON, witness for plaintiff, deposed as follows:

I knew plaintiff; remember when he got hurt. I have
62 been weighing cotton at depot here in Brownsville since 1871, on platform; saw plaintiff swinging trains there frequently before he got hurt; saw him and other boys swinging trains before he was hurt. They were there nearly every day. I suppose the trainmen saw them. They were often right in the caboose with the trainmen. They must have seen them. I never saw the trainmen try to put them off; have heard McLauglin warn boys off of the train and fuss at them. Some of the boys would try to steal a ride and others would go up boldly and swing the trains; did not see plaintiff day he got hurt; don't know whether the conductor saw him or not.

63 S. W. MATTHEWS, witness for plaintiff, deposed as follows:

I know plaintiff; don't think any person with one leg can make as good living as a person with two legs. It was customary for the boys to ride on the trains and to jump on and off while the trains were in motion. The railroad men all knew this. I was sheriff at the time plaintiff was hurt, and have at time told boys to keep off of trains. The railroad employees did not call on me to keep boys off of trains. Boys would meet trains at the depot for the purpose of riding on trains. I told the boys it was dangerous and not to get on the trains. W. H. Lea, the next friend in this case, is a shoemaker.

Plaintiff here closed.

64 *Defendant's Witnesses.*

J. W. MCLAUGHLIN:

I was living in Brownsville, Tennessee, and was depot agent for the defendant railroad company at Brownsville in Dec., 1881. I know plaintiff. I remember the day he was hurt by defendant railroad company's freight train; it was in Dec., 1881; it was about noon. He got hurt by freight train; did not see him at the time he got hurt; saw him a few moments afterwards. The train was going to Memphis. The train stopped at Brownsville and left the caboose on east of crossing and pulled balance of train west of crossing; saw plaintiff after he was hurt and helped to carry him to
65 Mr. Williams' house. He was on north side of track, towards Brownsville. The train had been stopped to fix hot box.

The crew were on south side of track fixing hot box. After box — fixed train backed up and coupled on the caboose and pulled out to Stanton, next regular station towards Memphis. Plaintiff got hurt immediately after train pulled out. There was no clearance post where plaintiff got hurt, nor none nearer there than 100 yards—no need of a clearance post where he got hurt; it was further down the track. When I got to where plaintiff was hurt I saw blood on the rail; looked to see what caused the injury; saw no obstruction of any kind. The track was clear of all
66 obstructions. Clearance posts are put generally 8 feet from main track to show main track is clear. Don't remember to have seen plaintiff the day he was hurt swinging on the train; have seen him swinging trains often before he was hurt, as well as other boys; have repeatedly warned him and other boys off; have thrown coal at them, not to hurt them but to scare them away; have whipped some of them for swinging trains. There was a warning put up at depot since May, 1881, to present time, warning all persons and boys from getting on trains while in motion; the warning was printed in large type, framed, with a glass over
67 it, the printing, to protect, and fastened to the side of depot-house in a conspicuous place, not too high or too low to be read.

Said warning was read to the jury, and is as follows:

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
OFFICE OF GEN'L SUP'T TRANSPORTATION,
LOUISVILLE, K'Y, *May* 31, 1881.

Warning.

All persons, except employees in the necessary discharge of their duties, are warned not to attempt to get on or off the cars or trains of this company while in motion or immediately preceding their being moved or switched. Several accidents resulting in loss of life or limb have been occasioned by grown persons and boys wrongfully at-
68 tempting to board trains while in motion. All officers and employees of this company are hereby instructed to use all legal means to prevent this very dangerous practice, and all citizens are requested to aid the company in their efforts to protect the lives of the people living along the line of road.

D. W. C. ROWLAND,
Gen'l Sup't Transportation.

Superintendents, agents, and others will have this notice prominently posted at depots and on all cabooses.

I know nothing of any conductor or brakeman at any time ever permitting boys to ride or swing the trains. The trainmen were all the time, as far as I know, trying to keep the boys off the
69 trains. Both before Woodson was hurt and since I have no interest in the suit. I am still in the employ of the defendant at Guthrie, Kentucky. The cars on freight trains extend about

18 inches over the rail. If boy catches hold of train while it is moving fast it will throw him down, and if he is lower than train and attempts to catch it and misses will fall head foremost under train; if high enough to reach train the train will throw him off from train. Woodson and other boys were in the habit of grabbing trains nearly every day at the depot.

MIKE GRADY, witness for defendant, deposed as follows:

Was conductor of freight train of Louisville and Nashville
70 Railroad Company in December, 1881. Recollect the day plaintiff got hurt. It was on 1st day of Dec., 1881, about one o'clock. The train was going to Memphis. I did not know any one was hurt until I got to Stanton. Saw a crowd about opposite Williams' house on track, but did not know any one was hurt until train reached Stanton, next stopping place. I came into Brownsville and stopped to fix hot box. The hot box was on south side of track from Brownsville. After fixing hot box I pulled out. Did not see Woodson that day; did not see him when he got hurt; did not see him that day swinging to train that day. Don't recollect
71 whether I saw any boys at depot or not that day. Boys were in the habit of swinging trains. I had orders to keep them off my trains and I gave orders to my men to keep all boys off, and we did our best to do so. I never gave any of the boys permission to ride on or swing my train; never allowed them to do so if I could help it; never received any apples from Frank Keely or any other boy to let them ride. The caboose was stopped near the passenger platform and the rest of the train pulled across the crossing. The caboose was detached from rest of train while we were fixing hot box. My instructions were to keep boys off of trains, and I did my best to keep them off; have
72 thrown coal at them and have seen my men throw coal at them to keep them off; never saw any brakeman take apples from boys to let them ride. There was no obstruction where boy got hurt. Boys were in the habit of swinging trains whenever they could. There were no boys swinging the train day plaintiff got hurt that I saw. They frequently got upon the trains when moving out to swing on them, but I did not see any of them on the train the day plaintiff got hurt. I have known the boys swing on train and ride as far as the old fields above Brownsville. The boys were in the habit of swinging the train
73 whenever they could. I knew the boys were laying around there waiting to swing the train the day the plaintiff was hurt. I am still in the employ of defendant.

W. R. HOLBROOK, witness for defendant, deposed as follows:

I am express agent at Brownsville, Tennessee, and was express agent there in December, 1881. Saw plaintiff day he was hurt. A few minutes before he was hurt he was jumping on and off of caboose car. I took him off of caboose and took him to my office and told him he had no business on there; that he would

get hurt. He fought me and cursed me and told me to go to hell. I have seen him, before he got hurt, jumping
74 on and swinging trains while in motion and trying to ride on them. He got hurt opposite Mr. Williams' house. I did not see him when he got hurt; there was no obstruction where he got hurt, that I know of. I did not go down to place where he got hurt. There was no clearance post where he got hurt; no need or use of one there. The clearance post was 300 feet below where he got hurt. I am not an employee of defendant. It is over 100 yards from depot to where boy got hurt. The day plaintiff was hurt and the day I took plaintiff off of the caboose—the caboose was at the time detached from the rest of the train. The caboose was
75 standing on the track in front of my office and rest of train was below and west of the street crossing railroad track, and the caboose east of the crossing or street. The train backed up and hitched the caboose onto train and pulled out for Memphis, and in a few minutes after train started boy was hurt. Caboose was standing still and detached from train when I took plaintiff off of it. The boys were in the habit of swinging the trains. I do not know where the crew were when I took boy off of the caboose; have seen him strutting around depot on his crutches since he got hurt.

76 G. GINLEY, witness for defendant, deposed as follows:

I was brakesman on train in December, 1881, when plaintiff was injured by train running over him. I saw plaintiff some days before accident and said to him, "You are at your old tricks again." I had seen him at Brinkley Arkansas. As the train pulled out from Brownsville I saw a crowd gathering on track, and said to conductor I thought some one was injured or hurt, and he telegraphed back from station, Stanton, to find out. All the railroad men knew these boys were in the habit of jumping on and off of the trains; saw plaintiff at depot day he was injured; never received any muscadines
77 or apples to let the boys ride; never told them they might ride. We had a full crew the day of the accident. Saw no "clearance post" at the point plaintiff was hurt; no use for any at that point. The train crew was on south side of train and boys on north side of train; did not try to keep the boys off of train day plaintiff was hurt; all the boys were in the habit of riding on the trains. I never invited the boys to ride on trains, nor permitted it if I could help it.

JOHN EDWARDS, witness for defendant, deposed as follows:

I was assistant agent and telegraph operator in Dec., 1881, for Louisville and Nashville Railroad Company at Brownsville,
78 Tennessee; recollect day plaintiff was hurt; was standing on platform of depot-house when the train pulled out. I saw him hanging on to the ladder used by brakemen to get upon top of cars. Train went about 2 car-lengths when he fell off and wheels of some of the cars run over his foot. He was on north side of cars next to Brownsville and so was I. I have seen him before the day

he got hurt trying to swing to trains while in motion; have chunked him off of trains many a time. I notified Sheriff S. W. Mathews to see if he could not do something to keep boys off of the train. There was a warning put up at depot warning all persons from try-
79 ing to get on train while in motion. The one shown me is the one referred to or exactly like the one put up. I telegraphed Mike Grady, conductor of train at Stanton, that plaintiff was hurt; he did not telegraph me asking if any one was hurt. I saw plaintiff day he was hurt. When the train by which he was hurt first came in it stopped in front of freight depot; plaintiff was swinging train then. I chunked him off. The train then pulled down to crossing and cut caboose off on east side of street crossing and pulled balance of train on west side of street crossing, fixed a hot box, and backed up and took caboose and pulled out for
80 Memphis, and then it was the boy was hurt, as already stated. I chunked the boy off of the train before it stopped to fix hot box. There was a negro or two that I chunked off at same time I chunked plaintiff off. The crew of the train were on the south side of train from me and from Brownsville. I believe some boys were there close around, but did not see any one on the train when it pulled out except plaintiff. As I have stated, plaintiff was in the habit of coming to depot to swing the trains. I reckon I have seen him there nearly 1,000 times, almost.

JAMES RYAN, witness for defendant, deposed as follows:

81 Was living in Brownsville, Tennessee, and was section foreman of defendant in December, 1881. My work included the — of the railroad and yard of defendant in Brownsville, Tennessee, and it was my duty to pass over the track every day to see if it was in order and to keep the track in order and keep it clear of all obstructions. I recollect time plaintiff was hurt. He got hurt about opposite Williams' house. I passed over the track in the morning of the day he was hurt and there was no obstruction on the track or in the yard. I came back over the track about 6 o'clock in the evening of same day and examined again and there were no obstructions. The clearance post was 150 or 300 feet from
82 where plaintiff got hurt. There was no staub or post of any kind where he got hurt. No staub or clearance post was taken up from there where he got hurt or any other place on track or yard after he got hurt, nor did I have any orders to take up any. I am still in the employ of the defendant.

SID. WINFIELD, witness for defendant, deposed as follows:

Was living in Brownsville, Tennessee, and portering at depot for L. & N. R. R. Company in December, 1881. Think it was in December, 1881, when Woodson got hurt. I am not positive about seeing him day he was hurt. Boys were every day trying to swing the trains. Conductors and trainmen would get after the boys to
83 keep them off of the trains. Have seen McLaughlin, agent at depot, trying to keep the boy Woodson and other boys off

of trains. Saw a lot of boys down there the day Woodson was hurt. Never noticed Woodson that day; never noticed any person trying to keep boys off that day; was — busy to see; was on the south side of track from Brownsville.

B. J. LEA, witness for defendant, deposed as follows:

Was down at depot in Brownsville one morning, a few days before Woodson was hurt, to take passenger train for Memphis; as the train was slowly pulling out I noticed Woodson swinging to the step of the moving car. I had just stepped on to the car, seeing the
84 danger Woodson was in. I told him to get off, that it was dangerous to do as he was doing and that he would get hurt if he did not quit. He cursed me and told me to kiss his behind. I kicked him off the steps.

This was all the evidence.

The court charged the jury as follows:

"*Charge.*"

GENTLEMEN OF THE JURY: The plaintiff sues for damages alleged to have been sustained by reason of the wrongful and tortuous acts and gross negligence of the defendant, as set forth in his declaration, which has been read to you. The defendant pleads not guilty and under this plea insists that the injury of the plaintiff was not
85 caused by any wrongful, tortuous, or negligent act of itself or servants, and, therefore, that it is in no way liable for the injury; and it further insists that the injury was brought on the plaintiff by his own wrongful and negligent acts, and that he cannot recover damages for such injury because it is the direct and proximate result of his own wrong and negligence.

The issues thus presented must be decided by you from the legal testimony which has been admitted before you and in accordance with the law as I shall charge it to you, you being the judges of the facts and the court the judge of the law, and it is not proper for
86 you to allow any prejudice against the defendant or any sympathy for the plaintiff to influence you in determining the case, if any feeling of this kind has been engendered in your minds by anything that has been said by counsel or witness during the progress of the trial.

The burden of proof is on the plaintiff. He must show by a preponderance of the proof such facts as entitle him to recover. He cannot recover unless he show that he received the injury as set forth in the declaration at the hands of the defendant, and that such injury was caused by the wrongful or negligent acts or conduct of the defendant or its employees. If he does prove these facts,
87 then, if nothing further be proved, he would be entitled to a verdict for some damages. If, however, you find from the proof all taken together that the injury was in fact sustained by the plaintiff, but that the defendant was not guilty of any wrongful or tortuous or negligent acts or conduct which brought about the injury

or contributed thereto, but that the plaintiff caused the injury to himself by his own fault or negligence or wrong, in that event you should return a verdict for the defendant against the plaintiff.

The general rule of law is that if a party by his own negligence or misconduct causes an injury to himself he cannot recover damages
88 therefrom nor can he do so where he contributed to the injury in an equal degree with the party sued—that is, when both parties are equally guilty of negligence in an equal degree or are equally blamable in other words; nor can a party recover damages for an injury which he might have avoided and prevented to himself by the exercise of ordinary care and prudence; but though the plaintiff may have been guilty of some negligence, yet if the injury was brought about by the more gross carelessness of the defendant or was more directly and immediately the result of the defendant's negligence or carelessness, then the plaintiff could recover
89 damages notwithstanding, with lesser or more remote negligence on his part.

A child of tender years is not bound to the same rule of care and diligence in avoiding danger which is required of persons of full age. The law only demands a degree of care and diligence and caution proportionate to the capacity and judgment of the child; and if the plaintiff be a child of tender years, then the law would require the defendant to exercise a proportionate degree of care and prudence and watchfulness to prevent an injury to him. So, gentlemen of the jury, you will consider and decide from the proof whether this plaintiff, considering his age, capacity, and experience, might have prevented this injury and avoided it by the exercise of reason-
90 able care and prudence for one of his situation, and if you so decide, then you will return a verdict for the defendant, or if you find that the plaintiff and defendant were equally at fault and blamable for the injury, taking into consideration the circumstances and situation of both parties and the age and discretion and capacity of the plaintiff, then in that event you will find for the defendant, or if you find that the defendant was in no fault and guilty of no negligence towards the plaintiff, considering the relative situation of both, and that it could not have prevented the injury to the plaintiff by exercising reasonable caution and prudence, viewing
91 its conduct and actions with reference to the caution which a prudent man would, under the same circumstances, have observed, then in that event you should return your verdict for the defendant.

On the other hand, if you find the injury was the direct and proximate result of the defendant's negligence or misconduct you will return your verdict for the plaintiff; or if you find the plaintiff was a child of tender years when injured and that his conduct and wrong did contribute to the injury, but that he was not possessed of such discretion and judgment on account of his infancy as would reasonably be calculated to cause him to avoid such danger,
92 and you further find that the defendant might have prevented and avoided the accident by the exercise of ordinary and reasonable prudence and caution, then in that event you should

return your verdict for the plaintiff. The plaintiff would be a trespasser if he was on the defendant's freight trains or swinging to one of them or in the defendant's yard or on its grounds trying to seize on to one of its cars. He would have no right to complain of a clearance post or staub being located on the defendant's track or road-bed if he was such trespasser, and defendant had put up or caused to be put up such clearance staub in its regular business.

If you find that the defendant is a corporation running
93 freight trains on its line of railroad through Brownsville, Tennessee, and that plaintiff, in December, 1881, was a small boy, about six years old, and that he and other small boys had been, prior to that date, for a long while in the habit daily of jumping on and off of the freight and passenger trains of defendant while they were in motion and riding thereon in and about the yards of defendants in said city, and that the conductors, brakesmen, and trainmen and agent of defendant at its depot in Brownsville had knowledge of such practices and habit of the plaintiff and other boys, and that the said conductors, agents, or brakesmen, or other employees
94 of the defendant willingly permitted and encouraged the plaintiff to so ride on and jump on and off of such moving trains, and that the agent or assistant agent of defendant and the conductor of the freight train by which plaintiff was hurt knew that plaintiff was at the depot or in the yards of defendant or near the train ready and likely to try to jump on said train when it might be put in motion, and that said train was so put in motion and moved off, and that plaintiff was hurt by being thrown under the wheels thereof while swinging to one of the freight cars or while running along by one of said cars endeavoring to swing on
95 the same, and that no effort or precaution was taken by said conductor or said assistant agent of defendant possessing such knowledge as aforesaid, then in that event I charge you the plaintiff would be entitled to a verdict for some damages against the defendant, and if you find such to be the facts you should return a verdict for the plaintiff.

On the contrary, if you find that the defendant, being such corporation and operating such trains, and having knowledge through its conductor, brakemen, and agents that the plaintiff and other boys prior to December, 1881, had been in the daily habit of riding on and jumping on and off of its trains, put up a warning to keep all persons off of such trains, and that its agents and em-
96 ployees did not encourage nor willingly permit the plaintiff to so ride on or jump on and off its trains, but, on the contrary, used all reasonable means that they could use and that was available to them, considering all the facts and circumstances, the extent of the danger, and the age of the plaintiff, and all the surroundings, to prevent the plaintiff from so riding and jumping on and off of said moving trains and thus going in such danger, and you further find that the plaintiff had been so warned to keep off, and that all other reasonable efforts had been made by the defendant that it could make to keep plaintiff off its trains and out
97 of danger thereof, and that when plaintiff was hurt no one of

the defendant's servants, agents, or employees saw him or knew he was on or trying to get on said train in time to prevent the accident, and he was so hurt without the knowledge of said employees of the danger in time to have prevented it, when they could not have stopped the train and prevented the accident or otherwise prevented it, for want of knowledge of the danger, until after the injury was done or until it was impossible to have prevented the injury, then, in that case, the defendant would not be liable for the
98 injury and you should return a verdict for the defendant, if you so find the facts from the proof. In weighing the evidence you are to consider the interest the witnesses have in the case, if any, their relation to either party, their intelligence, their motives, feelings of friendship or animosities, if any be shown, their means of knowing what they state, their manner on the stand, whether their statements are reasonable or the contrary, whether corroborated or contradicted by other facts in the case. You are to reconcile the testimony so as to give all the witnesses credit for truth, if you can do so consistently, giving the evidence a fair and natural construction.

99 It is your duty to look at all the evidence and judge what the true facts are and decide the case fairly and impartially, drawing on your experience and observation in life, weighing *and* circumstances carefully in the light of your knowledge of men and human affairs, with a view of getting to the truth. If you find for the defendant you will simply so report. If you find for the plaintiff it will then be your duty to assess his damages. In doing this you will be governed by the evidence and give such sum as from the facts you think would be fair and reasonable compensation for the injury done. You should consider whether the injury was permanent or temporary; whether great or only slight; the
100 character, nature, and extent of it; the extent of the suffering, whether mental or physical, of the plaintiff may also be looked to; the capacity of the plaintiff to earn money, whether such capacity has been lessened by the injury, and, if so, to what extent. Also you may allow him any necessary expenses, such as medical bills, he may have sustained, if any is proven, in being cured. If none be proven, then none can be allowed. The law affords no more definite rule to measure damages for any personal injury or for mental and bodily sufferings and pain, but the jury are to say from the proof what would be a reasonable sum to compensate the plaintiff for the loss sustained. This rule of com-
101 pensation is subject to this qualification. If you decide that the plaintiff is entitled to damages, but should also find that he was guilty of some negligence which contributed to the injury, but not under such circumstances as to bar any recovery, then it would still be your duty to take into consideration such negligence of the plaintiff in mitigation of damages—that is, you must take the plaintiff's contributory negligence into consideration, if you find he was guilty of such negligence, and will lessen the plaintiff's damages on that account just so much as you may think would be right and proper from all the facts. It is your duty to take

102 the law from the court. You are the exclusive judges of the facts, the weight of evidence, and the credibility of the witnesses.

The defendant tenders this its bill of exceptions to the judgment of the court overruling its objections to the admission of testimony and to questions leading to such testimony of other boys than plaintiff swinging to trains at other times prior to the day of the accident and of plaintiff swinging to trains at other times prior to the one by which and at the time when — was hurt, and also to the judgment of the court overruling its motion for a new trial and in arrest of judgment herein; which bill of exceptions is by the court signed
103 and ordered to be made part of the record herein.

W. H. SWIGGART, *Judge.*

Appeal Bond. Filed Sept. 1st, 1888. B. L. Capell, Clerk.

The Louisville and Nashville Railroad Company and H. B. Folk and S. L. Chambers acknowledge ourselves indebted to W. H. Lea, as next friend of Eddie Woodson, in the sum of two hundred and fifty dollars; to be void on consideration the said Louisville and Nashville Railroad Company shall successfully prosecute an appeal in the nature of a writ of error to the next term of the supreme court of Tennessee,
104 at Jackson, by him prayed from a judgment rendered against it in favor of the said W. H. Lea, as next friend of Eddie Woodson, in the circuit court of Haywood county on the 30th day of August, 1888, for the sum of three thousand dollars, debt and damages, and also costs of suit, or in case of failure to do so pay and satisfy damages and costs and perform and satisfy the judgment of the supreme court in the premises.

This September 1, 1888.

LOUISVILLE AND NASHVILLE R. R. CO.,
By H. B. FOLK, *Attorney.*
H. B. FOLK, *Security.*
S. L. CHAMBERS, *Security.*

105 I, B. L. Capell, clerk of the circuit court of Haywood county, Tennessee, do certify that the foregoing is a true and perfect transcript of the record in the case of Eddie Woodson, by his next friend, W. H. Lea, against the Louisville and Nashville Railroad Company.

Given under my hand and seal of office this the 10th day of December, 1888.

[SEAL.] B. L. CAPELL, *Clerk.*

106 *Brief History of Case.*

On or about December 1st, 1881, the plaintiff below, the beneficiary, then a boy six year- old, attempted to steal a ride on a freight train on the L. & N. R. R., at Brownsville, Tenn., by swinging to the cars in motion. He fell and his left leg was crushed. The trainmen did not notice him that day until he was hurt. He had been repeatedly warned and notified not to attempt to ride in that

way or to swing to trains. He was intelligent and smart in the sense that he thought himself able to paddle his own canoe.

The conductor and brakesmen of the train were engaged
107 in fixing a hot box on the south side of the train, and the plaintiff below was on the north side, several cars away. When the conductor finished the business he was engaged in he signalled the engineer to go ahead from the south side of the train, and as it pulled out the plaintiff below ran along and caught or attempted to catch hold of the ladder or slide bar of one of the box cars, when he fell under the wheels.

In 1887 he brought suit, by next friend, claiming $20,000 damages.

This is the third trial.

Two verdicts were set aside, the first for $3,000.00, the second for $5,000.00.

The present verdict is for $3,000.00.

108 LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
EDDIE WOODSON, by Next Friend, W. H. LEA, Defendant in Error.

Assignment of Errors. *Filed* 29 *March*, 1889. *John W. Buford, Clerk, by Rob't Lindsey, D. C.*

The plaintiff in error, The Louisville & Nashville Railroad Co., comes, by attorney, and assigns as errors for the reversal of the jndgment of the court below that tried and determined said cause the following:

First Error.

109 Because in the declaration of the plaintiff below he sued the defendant below for $20,000.00 as damages alleged to have been done to the plaintiff below by the defendant below on or about the 1st day of December, 1881, in the town of Brownsville, Tennessee, by and through the wrongful acts and gross negligence and tortious conduct of the defendant below in running a freight train owned and operated by defendant below on its road over the plaintiff below; and under the plea of "not guilty" of defendant below and the issue of fact thence arising the defendant below came to the trial of said issue so raised as aforesaid to prove that it was not guilty of tortious acts and gross negligence in running its
110 freight train over the plaintiff below on the date alleged, at the place alleged, and notwithstanding this issue of facts, narrowed down by the pleadings aforesaid and confined to the time and place aforesaid and to the mixed question of law and of fact of the gross negligence of the defendant below, as alleged in said declaration, his honor the trial judge permitted the plaintiff below to make proof of the boys, besides the plaintiff below at other times prior to the one when plaintiff below was injured, swinging to trains

of defendant below other than the freight train which ran over and injured him over the objection of defendant below to the
111 testimony aforesaid and its exception to the ruling of the trial court.

As to the issue raised as aforesaid, see declaration and plea. Record, pp. 5, 6, 7, & 8.

As to the introduction of testimony as aforesaid, see Record, pp. 22, 23, 24.

Testimony of plaintiff below, Eddie Woodson. Record, pp. 25, 26, 27, 28, 29.

Testimony of Maud Keely. Record, pp. 31, 33.

Testimony of Wm. Nixon. Record, pp. 34, 35.

Testimony of Frank Keely. Record, p. 36.

Testimony of W. W. Dupree. Record, p. 37.

Testimony of J. K. Hutchison. Record, p. 38.

Testimony of S. W. Matthews.

112 As to the objection of defendant below to the testimony aforesaid and its being overruled by the trial court and the exceptions of defendant below to the ruling of the court, see Record, page 25, top.

Second Error.

Because the proof introduced in accordance with the pleadings wholly fails to show that defendants below was [were] guilty of any negligence whatever in running its freight train as alleged, at the time and place alleged, over the plaintiff below, but, on the contrary, shows that plaintiff's injury was the result of his own gross negligence.

See Record, pp. 39, 40, 42.

Testimony of J. W. McLaughlin. Record, pp. 45, 46, 47.

113 Testimony of Mike Grady.

" " W. R. Holbrook, p-. 48, 49.

Testimony of John Edwards, p-. 52, 53, 54.

" " John Ryan, pp. 55, 56.

" " B. J. Lea, p. 58.

Third Error.

Because the charge of the trial judge was misleading to the jury in this, that he instructed them that "a child of tender years is not bound to the same rule of caution and diligence in avoiding danger which is required of persons of full age." "The law only demands a degree of care and diligence and caution proportionate to the capacity and judgment of the child." Whereas the proof shows the plaintiff below was not a child of tender years, but a
114 street Arab of unusual capacity. As to charge as above set out, see Record, p. 62, bottom, & p. 63, top. As to proof of capacity and character of plaintiff below, see Record, p. 58; testimony of B. J. Lea, Record, p. 54, top; testimony of John Edwards, Record, 50, bottom; testimony of G. Gurley, Record, 48; testimony of W. R. Holbrook, Record, 26; testimony of Maud Keely,

Record, p. 31; testimony of Will Nixon, Record, p. 20, top; testimony of Eddie Woodson, Record, p. 22, top; testimony of Eddie Woodson.

Fourth Error.

Because the charge of the trial judge to the jury was misleading and based on incompetent testimony admitted over the objection of defendant below in this, that he instructed them that
115 if they found the plaintiff below was in the habit of swinging trains and jumping on and off them in motion, in company with other boys, and that the conductors or agents of defendant below willingly permitted and encouraged them to do so, then that he would be entitled to recover some damages, and that they should return a verdict for the plaintiff below.

See Record, pp. 66, 67, 68.

Fifth Error.

Because the jury disregarded the law as charged by the court in regard to contributory negligence in mitigation of damages.

See Record, p. 74, bottom, as to charge.

See Record, p. 16, as to verdict.

116 *Sixth Error.*

Because the jury disregarded the law as charged by the court in regard to compensation as the rule in assessing damages.

See Record, p. 74, as to charge.

See Record, p. 16, as to verdict for $3,000.

The record nowhere shows any proof as to pecuniary loss sustained by the plaintiff below.

The plaintiff in error assigns the foregoing errors as reasons for the reversal of the trial court.

H. B. FOLK,
Attorney for Pl'ff in Error.

7th Error in Charging.

If plaintiff contributed to the injury in an equal degree
117 with the party sued he could not recover.

Rec., 62.

1st. Because this charge led the jury to believe that the negligence of both parties must be equal before plaintiff would fail. The jury was not allowed to consider the effect of plaintiff's negligence being the proximate cause of the injury, or the injury effect of his gross negligence.

8th Error in Charging.

If plaintiff was a child of tender years, then the law would require defendant to exercise a proportionate degree of care, &c., to prevent the injury.

Rec., 63.

1st. This charge required of defendant increased care, re-
118 gardless of the character of plaintiff or knowledge of his intention to get on train.

2d. Because this care was required, though the defendant may not have known plaintiff was near or intended to trespass upon train.

3d. Because this charge requires an increased care, from the tender age of defendant, regardless of his capacity, on the face of his having been warned off of trains.

9th Error in Charging.

That if employees did not encourage plaintiff to ride on cars on trains nor willingly permitted him, but used all reasonable means that they could and was available to prevent plaintiff from jumping on and off trains, and if they found plaintiff had been
119 warned, and that all reasonable efforts had been made that it could make to keed him off, and when he was hurt no one saw him until it was impossible to have prevented the injury, then defendant would not be liable.

Rec., 70, 71.

1st. This charge permitted a recovery, even if plaintiff was negligent, if he had prior to this time been permitted to ride on any train.

2d. The charge requires defendant to have been on the lookout for plaintiff and anticipated his climbing on the cars, though he might never before have done so.

3d. The charge in effect required defendant to have a guard up and down its train to anticipate plaintiff trespassing.

120 *10th Error in Charging.*

That if the jury found that the injury was sustained, but that defendant was guilty of no wrongful or tortious or negligent act or conduct which brought about the injury or contributed thereto, but that plaintiff caused it, then he could not recover.

Rec., 61.

1st. This charge throws the burden on defendant to show it was not the cause of the injury nor contributed thereto.

2d. Because, by this charge, if the defendant failed to show it did not contribute to the injury a verdict would go against it.

3d. Because if defendant in any way contributed to the
121 injury it would be liable, though plaintiff's negligence was the proximate cause.

11th Error in Court Charging.

That if conductors, brakesmen, agent, or other employee of defendant willingly encouraged plaintiff to ride on or jump off and on moving trains, and if the agent or assistant agent or conductor knew that plaintiff was at the depot, near the train, ready and likely to jump on when it might be put in motion, and that no effort was made by defendant's agents, &c., then plaintiff could recover.

Rec., 67, 68.

1st. Because the charge makes defendant responsible if any one in employ of defendant had before permitted plaintiff to get on the train.

122 12th. The charge of the court as a whole imposed such burdens on defendant that to comply would require defendant to have caught plaintiff and chained him down every time a train came to Brownsville.

13th. Because, from the uncontroverted facts in the record, the verdict should have been for defendant.

See plaintiff's own evidence. Rec., 20, 21, 22, 23, 24.

H. B. FOLK,
McCORRY & BOND, *Att'y-*.

123 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State for the western division thereof, at Jackson, at the April term, A. D. 188–.

Present: The Hon. Peter Turney, chief justice, and D. L. Snodgrass, H. H. Lurton, W. C. Caldwell, and W. C. Folkes, associate judges, when the following proceedings were had, to wit:

FRIDAY, *June 7th*, 1889.

L. & N. R. R. Co. *vs.* EDDIE WOODSON, by Next Friend, W. H. LEA.	# 1. Haywood Law Docket.

This cause was heard upon the transcript of the record from the circuit court of Haywood county, and the court adjudges that there is no evidence to support the verdict of the jury, but the defendant having obtained three verdicts of seperate juries upon dif-

124 ferent trials, two of which have been heretofore set aside by the circuit judge; and now alone upon this ground the statute of Tennessee forbidding the granting of more than two new trials in the same cause on the facts, which statute is not in conflict with Constitution of United States, 5th and 14th amendments, it is considered by this court that said judgment be affirmed, and that defendant in error, Eddie Woodson, by W. H. Lea, as next friend, recover of the plaintiff in error, The Louisville and Nashville Railroad Co., the sum of three thousand dollars ($3,000.00), amount of judg-

125 ment of court below and the costs of said court, and of it and S. L. Chambers, surety on appeal bond, the further sum of one hundred and fifty-three and $\frac{50}{100}$ dollars ($153.50), interests on said judgment from its rendition in the court below to this time, together with the costs of the appeal, for which let execution issue.

It is furthered considered by the court that the money be paid into this court, and the clerk will pay same to the guardian of said Eddie Woodson, when one shall have been appointed and qualified by the county court of Haywood county, taking the receipt of said guardian for the money so paid him in this cause.

And, on motion of A. D. Bright, D. A. Nunn, and Leigh
126 and Revelle, attorneys of record for defendant in error, a lien is hereby declared on the judgment recovered herein for their reasonable attorneys' fees of each of them for their professional services rendered defendant in error in the court below and this court in recovering the judgment herein, and this lien to attach to the funds in the hands of said guardian when paid him.

The clerk will retain out of the funds paid in this cause when paid into this court the costs in the case of Eddie Woodson, by next friend, W. H. Lea, *vs.* Louisville and Nashville Railroad Co., No. 2, Haywood law docket.

The judgment entered herein June 6, 1889, in this M. B.,
127 on page 445, is set aside and this judgment entered in its room and stead.

THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect, and complete copy of the record and proceedings & *and* assignments of error and decree of this court pronounced by said court at its April term, 1889, in the case of Louisville & Nashville Railroad Co. against Eddie Woodson, by next friend, W. H. Lea, as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in the city of Jackson, on this the 27th day of June, A. D. 1889, and of the Independence of the United States the 113th year.

Seal Supreme Court of Tennessee, Western Division, Jackson, Tenn.

JOHN W. BUFORD, *Clerk*,
By R. I. CHESTER, JR., *D. C.*

Endorsed on cover: Tennessee supreme court. No. 1182. The Louisville and Nashville Railroad Company, plaintiff in error, *vs.* Eddy Woodson, a minor, by his next friend, W. H. Lea. Filed July 25, 1889.

FILED
MAR 17 1890
JAMES H. MCKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1182.

The Louisville and Nashville Railroad Co.

PLAINTIFF IN ERROR,

VS.

Eddy Woodson, a Minor, by his next friend, W. H. Lea,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

Brief of Plaintiff in Error on the Motion to Dismiss and Affirm, under Rule VI.

ED. BAXTER, Attorney.

Marshall & Bruce, Stationers, Nashville, Tenn.

IN THE SUPREME COURT
OF THE UNITED STATES.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

VS.

EDDY WOODSON, BY NEXT FRIEND, W. H. LEA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR ON THE MOTION OF DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR, AND TO AFFIRM UNDER RULE VI.

I.

I agree that the sole question involved in the motion is presented in the judgment of the Supreme Court of Tennessee on page 32 of the printed transcript; and that so much of said judgment as is material for the purposes of this discussion, is correctly quoted on pages 1 and 2 of the brief for Defendant in Error. It will be seen from said judgment that the Defendant in Error had obtained against the Plaintiff in Error three verdicts of separate juries, upon different trials; that the first two of said verdicts had been set aside by the trial Court; that the Supreme Court of Tennessee adjudged that there was NO evi-

dence to support the third verdict; and yet, because a statute of Tennessee provides that "not more than two new trials shall be granted to the same party, in any action at law," said Supreme Court, *in deference alone to the mandate of said statute*, affirmed the judgment of the trial Court rendered on the third verdict, which was for three thousand dollars; said Court being of opinion, and so deciding, that said statute is not in conflict with the Fifth and Fourteenth Amendments to the Constitution of the United States.

II.

The Fourteenth Amendment to the Constitution of the United States contains the following, "nor shall any State deprive any person of life, liberty, or property *without due process of law;*" and the question is whether said statute of the State of Tennessee deprived the Plaintiff in Error of its property without due process of law, when it *compelled* the Supreme Court of that State to render judgment upon a verdict, which that Court adjudged there *was* NO evidence to support.

If that statute had not been in force, the Supreme Court of Tennessee would unquestionably have granted the Plaintiff in Error a new trial; for it was alone in deference to the mandate of the statute, that the Court refused a new trial, and affirmed the judgment on the verdict.

In the "due process of law," a party is entitled to a new trial, as a matter of right, when there is NO evidence to support a verdict, which has been rendered against him; and when a statute deprives him of that right, and compels the Court to pronounce judgment upon such a verdict, the execution of such a judgment necessarily deprives the party of his property "without due process of law;" for if he had been allowed the "due process of law," the verdict would have been set aside.

It is paradoxical to say that a judgment rendered upon a verdict which has NO evidence to support it, is rendered according to the "due process of law." The effect of the process which is to issue in this case, will be to deprive the Plaintiff in Error of the sum of three thousand dollars, and to give it to the Defendant in Error, when the highest Court in Tennessee has solemnly adjudged that there is absolutely NO evidence to show that the Plaintiff in Error is under any legal liability to pay it. The money is to be taken from one party and given to the other, simply and alone because three juries have so ordered, when the Court has adjudged that all three of the verdicts were wrong.

The Tennessee statute stands alone upon the monstrous proposition "that three wrongs make a right!" and *such* a right (?) is then claimed to be "due process of law."

III.

To ascertain whether a particular proceeding is "due process of law" "we must look to those settled usages, and modes of proceeding, existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition, by having been acted on by them, after the settlement of this country.

18 Howard, 277, Murray vs Hoboken Co.
95 U. S., 733, Pennoyer vs. Neff.
127 U. S., 540, Callan vs. Wilson.

One of "the settled usages and modes of proceeding," which existed in the common law of England, before the emigration of our ancestors, and which is shown not to have been unsuited to their civil and political condition, by having been acted on by them after the settlement of this country," was the "mode of proceeding" known as a "civil action at common law."

One of the essential features of that "mode of proceeding" was that all issues of fact should be tried by a jury, *under the supervision and direction of a judge.*

It was necessary that the issues of fact should be made up by the parties, under the supervision of the judge; and the verdict of a jury, unless it was founded upon an issue which had been regu-

larly submitted to the jury, by the judge, was absolutely null and void.

4 Cold., 625, Trabue vs. Higdon.

So the verdict of a jury, unless it was rendered under the personal supervision and direction of the judge, was *coram non judice* and void.

The judge was as much a part of the "trial by jury," as the jurors themselves were. "Trial by jury in the courts of the United States, is a trial *presided over by a judge.*"

123 U. S., 114, U. S. vs. R. R.

The chief duty of a judge, in his relation to the jury, is "to protect parties from unjust verdicts, arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of their lawful rights in the conduct of a trial." This is done by making plain to the jury the issue they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, "*and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.*"

"In the discharge of this duty, *it is the province of the Court, either before, or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor.*" * *

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"In the discharge of this duty, *it is the province of the Court, either before, or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor.*" * *

"*If he has not, then it is the duty of the Court, after a verdict, to set it aside and grant a new trial.*"

22 Wall., 121, 122, Pleasants vs. Fants.

One of the most essential features of the "mode of proceeding" known as a "civil action at common law," was that "whether there be *any* evidence was a question for the *judge*, but whether there be *sufficient* evidence was a question for the jury.

24 How., 227, Chandler vs. Roeder.
Heard Civil Pldg, p. 81, n. 1.
109 U. S., 482, Randall vs. R. R.
9 Peters, 299, Greenleaf vs. Birth.
19 How., 268–9, Richardson vs. Boston.
14 Wall., 447, Im'p Co. vs. Munson.
22 Wall., 120, Pleasants vs. Fants.
131 U. S., 241, Comm'rs vs. Beal.

A jury has no right to find any material fact without *some* evidence legally sufficient to establish it; and even the judge himself cannot empower a jury to find a material fact, of which there is NO evidence from which it may be legally inferred.

11 How., 373, Parks vs. Ross.
19 How., 268, Richardson vs. Boston.

After two new trials have been granted, the Tennessee statute, complained of in this case, attempts to deprive the plaintiff in error of the supervising jurisdiction, which the judge has always exercised in the trial of issues of fact in civil actions at common law; it attempts to deprive the judge of the power to protect the plaintiff in error from the un-

just verdicts of juries arising from ignorance of the rules of law and of evidence, or from impulse of passion or prejudice (22 Wall., 121–2); it attempts to deprive the judge of the power to decide whether there is *any* evidence to justify a verdict against the plaintiff in error, and to vest that power exclusively in the jury; and, finally, it attempts to convert the "trial by jury," which has always been "a trial presided over by a judge" (123 U. S., 114), into a trial by a jury *alone;* which, in effect, is no more than a trial by a mob. It will hardly be claimed that a trial by a mob is "due process of law."

IV.

In *Freeland* vs. *Williams*, 131 U. S., 418, Mr. Justice Miller said: "Judgments, however solemn, however high the Court which rendered them, and however conclusive in a general way between the parties, have been subject to review, to reconsideration, to reversal, and to modification by various modes. Among these are *motions for new trial*, appeals, writs of error, and bills of review; *and these have always been held to be due process of law;*" and yet it is claimed in this case that a party may be deprived of the right to a new trial even where there is no evidence to support the verdict, and that to do so is not to deprive him of "due process of law."

V.

It may be argued that as the Tennessee statute, complained of in this case, is general in its scope, and applies to all persons, it is for that reason "the law of the land," or "due process of law;" but Judge Cooley says that "general rules may sometimes be as obnoxious as special, if they deprive individual citizens of vested rights. While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, that condemns it as unknown to the law of the land."

Cooley Con. Lim., p. 440, 4th Ed.

VI.

It may be said that though the right of a party to a new trial where there is no evidence to support the verdict, had "always been held to be due process of law" (131 U. S., 418), according to the "settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors" (18 How., 277),

yet that what is "due process of law" may be changed by the State from time to time, without violating the Constitution.

This Court in *Hurtado* vs. *California*, 110 U. S., 537, decided that "any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, *which regards the principles of liberty and justice*, must be held to be due process of law;" and in the case then before the Court, it was held that the substitution for a presentment or indictment by a grand jury, of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced by the prosecution, was "due process of law;" because, in every circumstance of its administration, as authorized by the statute of California, "*it carefully considers and guards the substantial interests of the prisoner;*" and the same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given, by the same judges, when the prosecution was by information, as if it had been by indictment (p. 538).

In a word, the Court decided that one process or proceeding may be substituted for another, when the one is the substantial equivalent of the other,

in all that relates to the substantial interests of the party concerned.

But when the statute of Tennessee deprived the Plaintiff in Error of the "due process of law," known as a motion for a new trial to reverse a verdict which had no evidence to support it, no other process whatever was substituted in its place; and the substantial interests of the Plaintiff in Error were left to the mercy of the ignorance, passion, and prejudice of a jury, without any of the guards, or protection, which would have been furnished by the supervisory jurisdiction of a Judge.

VII.

When the Legislature undertakes to change what was known at the formation of the Constitution as "due process of law," it must remember that its powers in that regard are not "absolute and despotic." "It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power." Nor must it be supposed that the Fourteenth Amendment, prescribing due process of law, is too vague and indefinite to operate as a practical restraint. The power to change the due process of law must be exerted "within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

110 U. S., 535, Hurtado vs. California.
111 U. S., 708, Hagar vs. Reclamation District.

The words "due process of law" were intended "to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property."

115 U. S., 519, M P. R. R. vs. Humes.

They leave no room "for the play and action of purely personal and arbitrary power."

118 U. S., 370, Yick-wo vs. Hopkins
129 U. S., 124, Dent vs. West Virginia.

While the Constitution may not guarantee *particular* forms of procedure, it does guarantee by *some* form of procedure "the very substance of individual rights to life, liberty, and property;" and while the Legislature may alter the mode and application, it has "no power over the substance of original justice."

110 U. S., 532, Hurtado vs. California.

Though the Constitution does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue, it does refer to certain fundamental rights, which that system of jurisprudence, of which ours is a derivative, has always recognized; and if any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by due process of law."

"It must be conceded that there are such rights

in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberties, and the property of its citizens subject at all times *to the absolute disposition and unlimited control of even the most democratic depository of power, is, after all, but a despotism.*" * * * "It may be doubted, if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the *unlimited dominion of others*, whether it is not wiser that this power should be exercised by one man, than by many."

110 U. S., 536-537, Hurtado vs. California.

"The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, *at the mere will of another*, seems to be intolerable in any country where freedom prevails."

118 U. S., 370, Yick-wo vs. Hopkins.

A jury may be a very "democratic depository of power," but "it is, after all, but a despotism," when it is given "the absolute disposition and unlimited control" of the property of others, as it is given by the Tennessee statute complained of in this case. It is permitted to usurp the functions of the judge, and to decide whether there be *any* evidence to support its own verdict. The supervisory jurisdiction of the judge, which is the fundamental prin-

ciple that lies at the base of the right of trial by jury, as it existed at the formation of the Constitution, is swept away; and no substitute whatever is provided for the "due process" of new trial, of which the citizen is deprived by the statute.

His property, be it much or little, is subjected to "the absolute disposition and unlimited control of a jury despotism—a despotism which is too often blinded by 'ignorance,' and inflamed by 'passion and prejudice.'" Even the Supreme Court of the State is powerless to relieve the citizen from the despotism of a jury, notwithstanding that Court may solemnly adjudge, as in this case, *that there is not a scintilla of evidence to support the verdict.*

If the Tennessee statute had taken away the powers of the jury, and conferred them upon the judge, no one would have claimed that it was constitutional; and yet to take away the powers of the judge, and confer them upon the jury, is fully as injurious to the citizen; unless we are prepared to admit that the functions of the judge, in the trial by jury, are of less value in the protection of the life, liberty, or property of the citizen, than are those of the jury.

VIII.

It may be argued that as the right to a new trial, where there is no evidence to support the

verdict, is a right which was conferred by the common law, and that as the Legislature of a State may alter or repeal the common law at pleasure, it was competent for the Legislature of Tennessee to repeal that part of the common law which gave the right to a new trial.

The fault in the argument is that it proves too much.

Every process, or proceeding known as "due process of law," had its origin in the common law; and therefore, if the argument be sound, every process can be repealed by the Legislature, and we might have no "due process of law" at all.

In *Munn* vs. *Illinois*, 94 U. S., 134, this Court said that "a person has no property, no vested interest, in any rule of the common law;" and that the common law as a mere "*rule of conduct*, may be changed at the will, or even at the whim of the Legislature, *unless prevented by constitutional limitations.*"

In the case then before the Court, it was held that "a mere common law regulation of trade or business," such as the common law rule that the charges of a common carrier shall be reasonable, may be changed by statute; but the Court was careful to add that "rights of property, which have been created by the common law, cannot be taken away *without due process of law.*"

When a process, or mode of proceeding, had come to be known as "due process of law," although it may have originated in the common law, it passed under the protection of the Constitution, and it cannot be repealed, or altered by the Legislature, unless a substantial equivalent is substituted therefor.

So the right to a new trial, where there is no evidence to support the verdict, though it was a right originally created by the common law, had come to be known as "due process of law;" and the citizen cannot now be deprived of it, unless some other mode of proceeding be provided by which he can be protected from the despotism of a jury.

IX.

In *Walker* vs. *Sauvinet*, 92 U. S., 93, this Court said that "due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land—that is to say, with the Constitution, and laws of the United States, made in pursuance thereof—or with any treaty made under the authority of the United States. Here the State Court has decided that the proceeding below was in accordance with the law of the State; *and we do not find that to be*

contrary to the Constitution, or any law or treaty of the *United States*."

In *Missouri* vs. *Lewis*, 101 U. S., 31, this Court said that "the Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own mode of judicial proceeding." * * * "There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit, for all, or any part of its territory."

These cases may be relied upon by opposing counsel as authority for the proposition that a State may declare any process to be due process, however unusual, arbitrary, or oppressive, it may be, and that this Court has no power to protect the citizen.

I do not understand that either case affords the slightest countenance to such a doctrine.

I understand that what may be "due process" in one State, may be very different from what may be "due process" in another State. The "settled usages, and modes of proceeding," which existed in Florida, ceded by Spain, doubtless differed from those which prevailed in Louisiana, ceded by

France, and from those which prevailed in California, ceded by Mexico. And the "settled usages, and modes of proceeding," which prevailed in all three of those States, doubtless differed widely from those which prevailed in the States of common law origin. So in the States of common law origin there may have been more or less diversity of action, in their original adoption in this country, of the "settled usages and modes of proceeding which existed in the common and statute law of England before the emigration of our ancestors."

18 How., 276, 277.

But though "due process of law" in one State, may differ widely from "due process" in another State, yet whatever is "due process" in any State, is now protected in that State, by the Fourteenth Amendment to the Constitution of the United States; and it is now made the duty of this Court to see that the State does not deprive any one of its citizens of his property without the "due process of law" of that State, whatever such process may be found by this Court to be.

Prior to the adoption of the Fourteenth Amendment this Court had no power to protect a citizen of a State, who had been deprived of his property "without due process of law" by the action of his own State. He was forced to look alone to the Supreme Court of his State, and its decision as to what was due process of law in that State, was necessarily final and conclusive. But the Fourteenth

Amendment has conferred upon this Court the power, and has imposed upon it the duty to examine and decide for itself, what is "due process of law" in each of the States; and while it will doubtless show, as it has always done, the highest respect for the opinions of the Supreme Courts of the States, it cannot, if it would, evade the responsibility of forming its own opinion.

118 U. S., 356, Yick-wo vs. Hopkins.

It is to be regretted that the Supreme Court of Tennessee did not deliver a written opinion in this case, nor in the case of the *E. T., V. & G. R. R. Co., Plaintiff in Error*, vs. *McKemy, Defendant in Error*, which involves the same question, and is No. 1355 on the docket of this Court. I am informed, however, that in that case, two, of the five members of the Court, orally dissented from the majority, on the question as to whether the Plaintiff in Error had been deprived of its property without "due process of law."

X.

The State of Tennessee being of common law origin, and a daughter of North Carolina, it naturally fell heir "to those settled usages, and modes of proceeding, existing in the common and statute law of England before the emigration of our ancestors" (18 How., 276, 277), and, among them, to that "mode of proceeding" known as a "civil ac-

tion at common law;" including the trial of issues of fact by a jury *presided over by a judge* (123 U. S., 114), and motions for new trials where there is no evidence to support the verdict (131 U. S., 418).

In *McKinney* vs. *Craig*, 4 Sneed, 581, the Supreme Court of that State said "it has always held that where there was a decided preponderance of proof against the verdict, it was the duty of the Circuit Judge to set the verdict aside, and grant a new trial."

In *Tate* vs. *Gray*, 4 Sneed, 594, 595, the Court said that it is the duty of the Circuit Judge "to grant a new trial in all cases where he believes the preponderance of the proof is decidedly against the finding;" that, "although, by the theory of our system, the jury are the proper and exclusive triers of the facts, yet the law requires the Circuit Judge, who is presumed to have more practice and skill in the investigation of truth, to set aside their verdicts whenever, in his opinion, they have disregarded or misconceived the force of proof, that a new trial may be had; and that the time, expense, and trouble of another trial should never be regarded when the justice of a case requires it."

In a word, the right of a party to a new trial, where there is no evidence to support the verdict, has been recognized in Tennessee, from the earliest times; and nothing stands in the way of the Plaintiff in Error getting a new trial in this case, except the Tennessee statute, of which we complain.

XI.

There is probably no State in the Union where the deprivation of the right to a new trial operates more harshly, and oppressively, than in Tennessee; especially in an action for damages for negligence.

Under the practice which obtains in that State, it is practically impossible to get before the judge, the question of law as to whether the plaintiff is entitled to recover upon the facts as they really exist in such a case.

It has been adjudged that a declaration which simply charges that a defendant railroad company ran its engine and cars "wrongfully and negligently" upon, and against, the plaintiff is sufficient; and that it requires the defendant "to come prepared to show that it has neither done, nor omitted to do, any act" which the law declares to be negligence.

1 Pickle, 11, 15, E. T., V. & G. R. R. vs. Pratt.

The declaration in this case simply alleges, that by and through "the wrongful, and tortious acts, and gross negligence" of the defendant, the plaintiff was run over by defendants freight train. (*See Transcript, p.* 10.)

If the plaintiff could have been required to set forth the facts in his declaration, as they afterwards appeared upon the trial, the defendant below could

have demurred to the declaration, and could thus have taken away from the jury, and submitted to the judge, the question of law as to whether the plaintiff below was entitled to recover. The decision of the Supreme Court of Tennessee was that the real facts in this case did not entitle the plaintiff to recover; and yet it was impossible for the defendant below to raise the question, by demurrer to the declaration.

Formerly a defendant could, with the permission of the judge, withdraw the facts from the consideration of the jury, and submit their legal effect to the judge, by a demurrer to the evidence; but this mode of relief was not a matter of right; it rested in the discretion of the judge, and it was doubted whether the refusal of a judge to compel the opposite party to join in a demurrer to evidence, could, in any case, be assigned for error.

7 Cranch, 565, Young vs. Black.

At best, it was always an extremely hazardous step; because the defendant was compelled to admit, not the evidentiary facts as proved by the plaintiff, but the ultimate facts, which the evidentiary facts conduced to prove.

11 Wheaton, 323, Fowle vs. Alexandria.
5 Haywood (Tenn.), 162, Bedford vs. Inman.

I can find no instance of a demurrer to evidence being used in Tennessee since the case last cited, which was decided in 1818.

Another mode of withdrawing from the jury the consideration of the legal effect of the facts in a case, was by inducing the jury to find a special verdict. But that mode of procedure was not a matter of right; as it was optional with the jury, whether a special, or general verdict, should be found.

Steph. Plg. (91), Heard's Ed.

Besides it, like a demurrer to evidence, had to state not the evidentiary facts, but the ultimate facts, which the evidentiary facts conduced to prove.

20 How., 432, Suydam vs. Williamson.

Another mode of withdrawing from the jury the consideration of the legal effect of the facts in a case, was by the defendant moving for a non-suit; which he could do whenever he conceived that the plaintiff had failed in proving his case, supposing his evidence to be true, or where no evidence was given on his part; but at an early day, the Supreme Court of Tennessee decided, that out of a "scrupulous regard to the State Constitution, which provides that the ancient right of trial by jury shall remain inviolate," the former practice of ordering an involuntary non-suit, could not be adopted in that State.

2 Overton (Tenn.), 57, Bacon vs. Parker.

Another mode of practically withdrawing from

the jury the consideration of the legal effect of the facts in a case, is by the defendant asking the Court to peremptorily instruct the jury to find against the plaintiff, where there is no evidence, or not sufficient evidence, to warrant a recovery. This practice has in many States superseded the ancient practice of a demurrer to evidence, and, fortunately for the country, is firmly adhered to in the Federal Courts.

1 Wall., 369, 370, Schuhardt vs. Allens.

In *Pleasants* vs. *Fants*, 22 Wall., 121, 122, Mr. Justice Miller said: "*It is the duty of a Court, in its relation to the jury, to protect parties from unjust verdicts, arising from ignorance of law and of evidence, from impulse of passion or prejudice*, or from any other violation of his lawful rights in the conduct of a trial. This is done, * * * when necessary, *by setting aside a verdict, which is unsupported by evidence, or contrary to law.*"

Unfortunately for that class of parties who are peculiarly subject to "unjust verdicts, arising from ignorance, prejudice, or passion," the Supreme Court of Tennessee has decided, that under the Constitution of that State, a judge has no power to give a peremptory instruction for the jury to find for or against either party.

2 Cold., 241, Case vs. Williams.
5 Cold., 156, Ayers vs. Moulton.
6 Lea, 211, Gregory vs. Underhill.

The only remaining mode of procedure known to the common law by which the opinion of the judge could be obtained upon the legal effect of the evidence, was by motion for new trial; and this last, and only mode has been taken away by the Tennessee statute, complained of in this case.

The Plaintiff in Error has not only been deprived of *due* process, but it has been deprived of the *only* process of law, known to the Tennessee practice, by which it could submit to the judge, the *legal effect* of the evidence, which was unquestionably a matter of *law*, which the jury has no right to decide, under any system of jurisprudence, which has ever obtained in this Union.

XII.

The practical effect of the Tennessee statute is to prevent even the highest Court in that State from administering justice.

The evidence for a plaintiff in ejectment, may consist entirely of documents, and his own evidence may clearly show that he is not entitled to recover; and yet if it happens that the plaintiff is popular, and the defendant is unpopular in the county, the plaintiff may obtain three verdicts; and, after the second verdict, even the Supreme Court of the State is powerless to relieve the defendant; though it may solemnly adjudge that the plaintiff's own evidence shows that the land belongs to the defendant.

Where the parties are citizens of different States, the defendant may remove the case to the Federal Court; but where both parties are citizens of Tennessee, the case cannot be removed from the State Court; and yet the highest Court of the State is deprived of the power to protect the very class of its citizens who stand most in need of protection—namely, those who are so unfortunate as to be the objects of personal, or political unpopularity, or prejudice.

XIII.

The attorney for Defendant in Error, on page 8 of his brief, uses this language: "*The Plaintiff in Error is a rich and powerful corporation; the Defendant in Error is a private citizen.* The evident purpose of this proceeding is by long, tedious, and expensive litigation, to deter others from an effort to obtain redress for their wrongs. The writ of error was sued out for delay only," etc.

If counsel deem it appropriate to address such an appeal to the Supreme Court of the United States, we can easily imagine the character of the appeals that were addressed to a community where the prejudice against "a rich and powerful corporation," was so great that three juries could be found, to render separate verdicts, in favor of "a private citizen," when, in the opinion of the Supreme Court, there was absolutely no evidence to sustain them.

Surely I need no further evidence to satisfy this Court, that in such a community, "a rich and powerful corporation" needs all the protection, which can be afforded by the "due process of law."

XIV.

As to the motion to dismiss for want of jurisdiction: the judgment of the Supreme Court shows upon its face that the Court affirmed the judgment of the Court below, *alone* upon the ground that the Tennessee statute forbids the granting of more than two new trials, on the facts; "*which statute is not in conflict with the Constitution of United States, Fifth and Fourteenth Amendments.*"

It is sufficient for the federal question *to be entered on the record* of the State Supreme Court; where the record shows, as it does in this case, not only that the question was raised by the Plaintiff in Error, but that it was actually decided against him.

16 Pet., 281, Armstrong vs. Treasurer.
1 Wall., 143, Bridge vs. Hoboken Co.
8 Wall., 56, Furman vs. Nichol.
96 U. S., 442, Murray vs. Charleston.

XV.

As to the motion to affirm: Rule 6 requires that it must be manifest that the writ of error was taken

for delay only, or that the question is so frivolous as not to need further argument. I have already stated that my information is that two, out of the five members of the Supreme Court of Tennessee, dissented on the question presented in this argument. I have been unable to find the precise question directly decided; and opposing counsel has cited no such decision in his brief. In *Freeland* vs. *Williams*, 131 U. S., 418, Mr. Justice Miller said: "This phrase, 'due process of law,' has always been one requiring construction; and, as this Court observed long ago, never has been defined, so as to draw a clear and distinct line, applicable to all cases, between proceedings which are by due process of law, and those which are not." The case of *E. T., V. & G. R. R. Co.* vs. *McKemy*, No. 1355 on the docket of this Court, involves the same question, and I respectfully submit that the motion to affirm in this case should be denied, so that both cases may be heard together on full argument.

Ed. Baxter

Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1182.

THE LOUISVILLE and NASHVILLE RAILROAD COMPANY.

PLAINTIFF IN ERROR,

VS.

EDDY WOODSON, A MINOR, BY HIS NEXT FRIEND, W. H. LEA.

DEFENDANT IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

Brief of Defendant in Error on the Motion to Dismiss and Affirm, under Rule VI.

FREEMAN & MONEY, ATTORNEYS.

Brief for Defendant in Error.

I

The brief of the learned counsel for plaintiff in error raises a question of practice, the determination of which, it seems to me must decide this case.

The purpose of this motion is to invoke the judgment of this Court as to whether the judgment of the Supreme Court of Tennessee presents a Federal question. The opinion of the Supreme Court, set out in full in my brief, presents, as I think, "the sole question involved in this litigation." It seems to me however that this opinion ought to receive a *reasonable* rather than an *unreasonable* construction. To give it as the counsel for plaintiff in error has done, a literal construction, is to convict the entire judiciary of Tennessee of an absurdity.

He has seized upon the word "no" as found in the third line of the opinion which after "capitalizing" eight times in his brief he proceeds to further emphasize by the declaration page 3 that the court "has solemnly adjudged that there is "*absolutely*" no evidence," &c. And again on page 17, "notwithstanding the court may solemnly adjudge, *as in this case, that there is not a* SCINTILLA *of evidence to support the verdict.*"

If, therefore, we are to accept the the language of the Supreme Court of Tennessee as construed by the counsel for plaintiff in error, it follows that three juries have agreed in in finding a verdict for the defendant in error based alone upon the statements contained in his declaration, unsupported by a "SCINTILLA of evidence"!!

If it should appear even by inference that such a monstrous outrage has been committed then the three juries who perpetrated the wrong are *justly* obnoxious to the term "mob" as applied to them by the counsel for defendant in error. The Supreme Court did not mean that there was "absolutely NO evidence;" not a "*scintilla*" of evidence. It did not mean to hold literally that there was "no" evidence. For in view of the fact that the record now on file in this court contains nine pages of printed evidence, all of which has been held to be competent; in view of the fact that there is *absolutely no controversy about the fact that the cars of the plaintiff in error* RAN OVER AND MAIMED FOR LIFE *the defendant in error a* CHILD SIX YEARS OF AGE, a literal and emphatic construction of the language of the Supreme Court that there is "no" evidence to support the verdict is somewhat startling!

II

I said in my original brief that this is not a Federal question.

The purpose of the 25 section of the act of 1789, as amended by the 2d section of the act of 1867, was to empower this court to pass upon the validity of a State law or "authority exercised under any State."

It is the *statute* that is on trial, not the *abuse* of the statute.

To entitle the plaintiff in error to have the judgment of a State court reexamined it must appear by the record that the case is within the appellate jurisdiction of this court under the 25th section of the judiciary act of 1789.

Inglee vs. Coolidge 2 Wheat 368.
Gleason vs. Florida 9 Wall 783.

While the opinion rendered by the Supreme court may be looked to it is not conclusive of the question.

"But after all" (said this court in the case of Murdock vs.

Memphis 20 Wall. 634) the record of the case, its pleadings, bills of exception, judgment, evidence, in short its record, whether it be a case of law or equity, must be the chief foundation of the enquiry; and while we are not prepared to fix any absolute limit to the sources of the enquiry under the new act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

III.

The language of the 25th sec. of the Act of 1789, and the 2d section of the Act of 1867, (for the two acts are identical as to this point,) is "That a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had where is drawn in question the validity of a * * * * statute of or authority exercised under any State on the ground of their being repugnant to the Constitution * * * of the United States."

Three things must appear—

1st. That the validity of the statute is "drawn in question."

2d. That it is drawn in question by the suit.

3d. It must be "drawn in question" on the ground of its repugnance to the Constitution of the United States.

The Federal question, so called, is "raised" for the first time in this case in the opinion of the Supreme Court rendered on the affirmance of the judgment of the trial court.

The validity of the statute was not "drawn in question" by the pleadings.

Nor can the jurisdiction of this court be maitained "by merely raising one of those (Federal) questions." Were it otherwise "it follows that there is no conceivable case so insignificant in amount, or unimportant in principle, that a perverse and obstinate man may not bring it to this court

by the aid of a sagacious lawyer raising a Federal question in the record, a point he may be wholly unable to support by the facts, or which he may well know will be decided against him the moment it is stated"

2 Wall. 629

It must appear of record that the validity of the statute "was drawn in question." That it was drawn in question on the ground of its being "repugnant to the Constitution."

The validity of the "statute" or authority must be drawn in question by the *suit*. I am aware that under the recent decisions of this court it is competent to look to the opinion delivered by the court (20 Wall. 633), in order to determine "whether one of those questions was actually raised or determined." Yet I insist that if upon an examination of the whole record, or even the judgment decree, or *opinion of the court wherein the question is stated or raised* it appears that in neither the pleadings nor the argument was the validity of the statute attacked then this court has no jurisdiction.

IV.

There must appear to be a conflict between the statute or authority sought to be exercised by the State, and the Constitution, treaties or laws of the United States, and the decision must be in favor of the former and against the latter.

It is a question of *repugnance* to the Constitution; the validity of the statute is drawn in question on the ground of its repugnance.

If I am not correct in this, it is in the power of any lawyer to have any case he may desire reviewed by this court. So also the judges of the State court may compel any litigant to come to this court for relief.

All that is necessary is for the attorney to claim that the statute under which the proceedings are had is in violation

of a certain article of the Constitution, and for the court to decide the question against him, and thereupon he insists that a federal question has been "raised."

Nor is it at all necessary to the successful prosecution of his scheme for annoying and harrassing his antagonist that he state with any degree of accuracy the particular article of the Constitution to which he supposes the statute to be "repugnant."

Take the present case for an illustration. The State court declares "which statute is not in conflict with the Constitution of the United States, 5th and 14th amendments." As well may the court have held that the State law which prohibits the judge from granting more than two new trials to the same party in the same suit alone upon the ground that the verdict was not sustained by the evidence is not repugnant to the 7th amendment which declares that "in suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law."

The statute in question sustains the same relation to this as to the 5th amendment.

Why not declare that the statute in question is not repugnant to either of the first ten amendments? For these amendments are restrictions upon National and not upon State authority.

V.

But the court held further that the statute "is not in conflict with" the 14th amendment.

"Nor shall any State deprive any person of * * * property without due process of law."

The plaintiff in error insists that because the State will

not exempt it from the requirements imposed upon its other citizens of having their acts enquired into by a jury that *the State is about to deprive it of its property without due process of law!*

It insists that a statute which requires it to submit questions of fact which relate to its operations to a jury, is unconstitutional.

It insists that notwithstanding the provision of the Federal Constitution which requires all matters of fact in suits at the common law involving twenty dollars to be submitted to a jury; and notwithstanding the provision in the State Constitution wherein it is declared that the right of trial by jury shall remain inviolate, that it has a right to invoke the powers of this, the highest Court of the Nation to declare that all State constitutions and statutes which require it to submit its rights to the determination of a jury are unconstitutional.

The naked proposition is this:

THAT THE ULTIMATE AUTHORITY TO DETERMINE WHETHER THE FACTS IN THE CASE ENTITLE THE PARTY TO A VERDICT RESIDES IN THE JUDGE.

And this proposition is directly in the teeth of the doctrine laid down by this Court in the case of Nudd et al vs. Burrows, Assignee, 91 U. S., 439, where it is said "Questions of law are to be determined by the courts; questions of fact by the jury. The authority of the jury as to the latter is as absolute as the authorty of the court with respect to the former. *No question of fact must be withdrawn from the determination of those whose function it is to decide such issues.*"

VI.

If the statute which prohibits the granting of more than two new trials on the ground that the evidence does not

support the verdict is void, it follows necessarily that the law which forbids the judge to charge the jury with reference to the facts is also void, for it involves an absurdity to say that a judge may by continuously setting aside verdicts coerce the jury into the rendition of a verdict which he approves, yet may not beforehand instruct them as to the character of the verdict which, in his opinion, should be rendered.

The counsel for plaintiff in error cites the case of Pleasants vs. Fant, 22 Wall., as defining the duty of the trial judge. It is a sufficient reply to say that this rule applies alone to Federal Courts. It is not the law of Tennessee; for the constitution of that State absolutely prohibits the judge from commenting on the weight of evidence.

And this case must be determined by the laws of Tennessee in so far as they are not in conflict with the Constitution. The practice in the Federal Courts of charging juries as to questions of fact is of comparative recent origin, and it is not pretended that they are under any obligation to do so.

14 Wall. 448.
22 ibid 120.

VII.

If the jurisdiction of the court can be maintained in this case it is difficult to imagine a case to which it would not attach; for every decision of a State court which sustains the validity of a statute is *ex ci termini* a decision that the statute in question is not in contravention of the constitution or laws of the United States. It will not suffice to show that under the statute a great wrong has been done; that the power conferred on the jury, or on the court as the case may be, has been abused.

Whether the plaintiff in error is about to be deprived of

its money unjustly and wrongfully is not the question.

Is it about to suffer the deprivation "*without due process of law?*"

> "*It is to be observed in the first place that the language of the prohibition against State interference with life, liberty or property is that the deprivation of these precious rights shall not be had without due process of law.*"
>
> 131 U. S. 418.

Suppose the jury, or rather the three juries literally took the bit in their teeth and ran away with the law?

Suppose the plaintiff in error has been robbed by this "mob," as the jury is called; what then? It was not the action of the State. The statute did not coerce these verdicts. The juries were properly instructed. No incompetent evidence was allowed to be submitted.

It has repeatedly been held that the constitutional inhibitions placed upon the States do not relate to or take hold of the unlawful acts of the citizens.

It is an inhibition placed upon the State.

And the fact that powers conferred on the judges, juries or other officers of the State have been abused does not give this court jurisdiction. Otherwise this court becomes the ordinary appellate court for all suits tried in the State.

Suppose in this case that the trial judge had refused a new trial in the first instance, and the Supreme Court had held that while there was no evidence to support the verdict yet it was within the discretion of the trial judge to deny the new trial, and had there upon affirmed the judgment below. Is it pretended that the plaintiff in error could "catch "the jurisdiction of this Court by averring that it was entitled as "due process of law" to a new trial; that this was denied, and therefore it was about to be deprived of its property without due process of law?

"We know that this is a power that may be abused, but that is no argument against its existence. For protection against abuses by its legislatures the people must resort to the polls, not to the courts."

Munn vs. Illinois. 94 U. S. p. 134.

The gravemen of the complaint in this case rests not so much nponthe *statute*, as upon the *jury*, or rather three juries; the thirty-six men described in the record as "good and lawful men."

VIII.

The counsel for the plaintiff in error cites quite an imposing array of authorities to support the proposition that while the *sufficiency* of the evidence is a question for the *jury*, the question of whether there be *any* evidence is for the *judge*. It is a sufficient answer to say that while this rule applies to the courts of the United States it does not in the sense contended for apply to the courts of Tennessee. I say it does not apply in the "sense contended for" because it seems to me that the learned counsel has confounded the terms "any" and "sufficient." For if the plaintiff should read his declaration and then rest his case without the introduction of "any" evidence it would unquestionably be the duty of the court to instruct the jury that the declaration was not evidence. But if he should introduce a single witness whose testimony "tended" in the slightest degree to establish the plaintiff's demand it would be the duty of the court to submit the issue to the jury. The *judge*, as a matter of *law*, passes on the *competency* of the evidence; but the jury alone determine its weight or "sufficiency."

The counsel for plaintiff in error, on page 3, says "The Tennessee statute stands alone upon the monstrous proposition that 'three wrongs make a right.'"

IX.

He is mistaken. It is the result of two propositions. The first is organic.

"*The right of trial by jury shall remain* INVIOLATE."

The second is axiomatic "*Interest reipublicæ ut sit finis litium.*

"Trial by jury," says the counsel for plaintiff in error "is a trial presided over by a judge." True enough, but let us finish the quotation.

"Trial by jury in the courts of the United States is a trial presided over by a judge, with authority not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, *provided only he submits those questions to their determination.*"

U. S. vs. R. R. Co. 123. U. S. 114.
118, U. S, 553.
122, U. S. 362.
13, How. 131.

So well settled is the doctrine that the jury are the judges of the *facts* that this court in the case of Carver vs. Jackson, 4 Pet. 81, expressed its "decided disapprobation of the practice of bringing the charge of the court below at length before this court for review." * * * "With the charge of the court to the jury upon mere matters of fact, and with its commentaries upon the weight of evidence this court has nothing to do. Observations of that nature are understood to be addressed to the jury merely for their consideration, as the ultimated judges of matters of fact, and are entitled to no more weight or importance than the jury in the exer-

cise of their own judgment choose to give them."

Paul vs. Virginia, 8 Wall. 182.

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such trial, is, it is believed, incorporated into and secured in every State Constitution in the Union. * * * * One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases." * * * * * * "No fact tried by a jury shall be otherwise re-examinable any court of the United States than according to the rules of the common law." * * * * "The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de novo, by an appellate court for some error of *law* which intervened in the proceedings."

Parson vs. Bedford 3 Pet., p. 446, et Seq.

X.

It seems to me that the mistake that lies at the very foundation of this proceeding grows out a failure to recognize in the jury system an integral part of our judiciary.

The jury is not a mere appendage of the court; not a mere advisory board organized to assist the judge in arriving at the facts. Long antedating our jury system as it now exists our Ango-Saxon ancestors practiced a system of submitting questions of *law* to the judges, and questions of *fact* to another "body of men apart from the court, but summoned to attend to it in order to determine *conclusively* the facts in dispute."

Proff. Jury Tr. Sec. 11.

Out of this practice grew a system that is now firmly embedded in the organic law of every Anglo-Saxon people.

Under the English practice (which has been to a considerable extent adopted and followed by the Federal Courts of this country,) the judge might advise the jury with reference to the facts, *but the plaintiff had a right to demand that the facts be submitted to the jury.*

Proff. Jury Tr., Sec. 107.
Broom & Hadleys Com. 264, citing 2 Starkie on Evidence, Sec. 806.
Watkins vs. Towers, 2 T. R. 282.
Demar vs. Purday, 3. Ad. & E., 166.

"The principle is well established in legal investigations that the *court* is to decide upon the *law*, and the *jury* upon the *facts*."

Proff. Jury Tr., 107.

When there is *any* evidence tending to established a fact it is error for the court to instruct the jury that there is no evidence to establish it, the jury are to judge of the sufficiency.

Proff. Jury Tr., Sec. 321.
40 Me. 212.
41 Ala. 510.
15 Mich. 332.
38 Ga. 252.
42 Mo. 439.

Commenting on the weight of evidence, while allowable under the English practice, is nevertheless "an abuse to which a charge is often liable."

Proff. Jury Tr. Sec. 322.

"The right of trial by jury has from the earliest time been regarded as one of the greatest securities of life, liberty and property of the citizen."

Thomp. & M. on Juries, 2.

XI.

But the counsel for the plaintiff in error insists that his client is about to be deprived of its property "without due process of law" be cause a new trial is "due process of law" and he has been denied a new trial; and on page 7 of his brief he quotes at length from Freeland vs. Williams, 131, U. S. 418, to sustain this view.

This contention is as novel as it is illogical. No one pretends that "motions for new trials, appeals, writs of error and bills of review" are not "due process of law."

So also are judgments and decrees, overruling motions for new trials, dismissing writs of error, &c.

The plaintiff in error has already had more "process of law" than generally falls to the lot of one litigant. Three trials, three verdicts, three motions for new trial, (two of them granted,) a final judgment in the trial court, appeal to the Supreme Court and final judgment thereon,

And yet it insists that this is not due process of law!

XII.

I have not attempted any elaborate definition of the term "due process of law." To do so would be to write a book on State and Federal practice.

In discussing the question of what is "due process of law" this court in the case of Dent vs. West Virginia 129 U. S. said:

"As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms "due process of law" a definition which will embrace every permissible exertion of power effecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their re-

quirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. They were deemed to be equivalent to "the law of the land." In this country, the requirement is inteuded to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters: that is, by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is abitrary and capricious in legislation affecting the rights of the citizen. As said by this court in Yick Wo. vs. Hopkins, speaking by Mr. Justice Matthews: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

118 U. S. 356, 369. See also Pennoyer vs. Neff, 95 U. S. 714, 733; Davidson vs. New Orleans, 96 U. S. 97, 104, 107; Hurtado vs. California, 110 U. S. 516; Missouri Pacific Railway Co. vs. Humes, 115 U. S. 512, 519.

XIII.

Suppose the three verdicts were entirely unsupported by the evidence. Suppose the judgment of the Supreme Court in refusing to order a new trial was wrong. Suppose as a matter of fact the plaintiff in error owes the defendant in error nothing, what then? Will this court in order to correct this assumed error violate one of the fundamental principles of construction as laid down in the following decision?

"And still further such a construction followed by the reversal of the judgment of the Supreme Court * * * * * * would constitute this Court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistant with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most odinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other, and of both these governments the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

16 Wall. 78.

The counsel for plaintiff in error says that whether there be *any* evidence is a question for the judge.

So far as the courts of Tennessee are concerned the truth of this proposition depends upon the meaning which he attaches to the word *any*. The rule of law in that State is, that the court determines as a matter of law what is admissible to the jury. But the question of the credibility of witnesses, the weight of evidence; the allegations proved, or disproved, are matters *exclusively* for the jury.

2 Yer. 293.
3 Hum. 290. 304.
2 Lea. 596.
6 Lea. 211.

XV.

That the statute complained of is not "repugnant" to the 14th Amendment appears from another consideration. This Court in the Slaughter House Cases, 16) Wall.) discusses

at some length the purpose of the 14th Amendment, holding that it was not designed to uproot the systems theretofore existing in the States in the various matters relating to personal rights, private property, &c. That the principal purpose was to engraft upon the organic law guarantees against partial and unqual legislation, and particularly against legislation unfriendly to the recently emancipated race. But—

"Under the pressure of all the excited feeling growing out of the war," say the Court, speaking by Mr. Justice Miller, "our statesmen have still believed that the existence of the States with all the powers for domestic and local government, including the regulation of civil rights—*the rights of person and property*—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional powers on the Nation."

16 Wall. 82.

So also in the Cruikshank case, 92 U. S. 554: "The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the law; but this provision does not, any more than the one that precedes it and which we have just considered, *add anything to the right which one citizen has* under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. *That duty was originally assured by the States, and it still remains there.*"

XVI.

The XIV Amendment was not intended to be retroactive.

It was not the purpose therefore of the 14th Amendment to alter or abridge the rights of the States in matters relat-

ing solely to their internal policy as administered alike to all.

Happily we are not left to mere theory or conjecture on this point. In the case of Bartemeyer vs. Iowa, 18 Wall, 132, it was sought to test the constitutionality of the law prohibiting the sale of ardent spirits. It was insisted that the law violated that part of the 14th Amrndment which prohibits the State from depriving a citizen of his property "without due process of law."

This Court, speaking by Mr. Justice Miller, held that as the "statute complained of was in existence long before the amendment of the Federal Constitution which is invoked to render it invaled;" the immunities and privileges as they stood prior to the adoption of the amendment have "*not been abridaed by any action of the State legislaiure since that amendment bec me a part of the constitution.*"

In the case under consideration the statute which it is insisted violates the 14th Amendment was enacted in 1801, it was in line with the jury system as embodied in the Constitution under which the State was admitted into the Union.

The 9th section of the 6th article of that instrument provides that "

Judges shall not charge juries with respect to matters of fact but may state the testimony and delare the law."

Constitution, Tenn., Article 6, Sec. 9.

If the statute complained of is unconstitutional it follows that this provision of the State constitution must go also, for it is worse than folly to say that while a judge may be prohibitedf rom charging the jury as to the facts, yet he cannot be prohibited from setting aside the verdict as often as he may disagree with the jury as to their conclusions drawn from the evidence submitted to them.

XVII.

Plaintiff in error has not been denied due process of law because it failed to avail itself of a remedy provided by the State to meet the very wrong of which it complains.

If notwithstanding what has been said there is still a doubt as to whether the plaintiff in error is entitled to have this case re-examined I desire to submit another consideration which I think is absolutely conclusive.

To appreciate the force of this consideration however it is necessary to advert again to the real complaint.

No objection is made to the charge of the trial judge to the jury, nor the action of the Supreme Court.

The complaint is that the cause was tried by a jury governed by passion and prejudice ; a *mob*, that it (plaintiff in error) was powerless to protect itself from this mob. And it invokes the revisory power of this Court to save its property from this spoliation.

Before it is allowed to invoke this extraordinary action involving as it does questionable if not serious consequences the plaintiff in error ought at least to be able to show that it has resorted to every legal remedy known to the laws of the State.

And yet it has utterly failed to do so as will directly appear. In order to meet just such a state of affairs as the plaintiff declares environed his suit in the State court, the legislature of Tennessee has provided for a change of venue. In order that this Court may see and understand that the plaintiff in error has not been deprived of its property without due process of law; that it has had all the process it asked for, and wilfully declined other process offered to it by the

statute, I will here set out in full the provision made for a change of venue. I quote from History of a Law Suit, a recognized authority by Judge Caruthers, formerly one of the Supreme Judges of the State.

CHANGING THE VENUE.

The venue may be changed, that is, the suit may be transferred for trial to another county, at any time after issue joined and before the trial. Issue must be joined first, because it cannot be known whether it is to be an issue of law to be tried by the Court, or an issue of fact to be tried by a jury. And it is only in the latter case that the venue can be changed. (Code, 2835.) There is one exception made in 3924, which provides that when the Judge is interested in the cause, he shall, at the request of the opposite party, transfer it to any Court in an adjoining circuit which the adverse party may choose. Whether it is an issue of law or fact, can make no difference in such a case.

HOW CHANGED.

294. Upon application of either party, supported by a written statement on oath, that he verily believes that, owing to prejudice or other causes then existing, he cannot have a fair and impartial trial in the county in which the case is pending. The truth of this statement must be verified and supported by the oath of at least three respectable and disinterested persons, which can only mean witnesses of unquestioned credibility and competency. (Code, 2837.)

It may be that the prejudice is not against the plaiutiff or defendant personally, but against his title or cause. Then it should be so stated. It may be neither, but a deep and extensive sympathy with the other party. Whatever it is, it must be stated and verified by the oath of three men.

This application may by, consent in writing of the other party, be made to the Judge in vacation; otherwise it must be made during the term. (Code, 2840.) If the Judge is satisfied of the truth and goodness of the cause stated, he orders the change.

TO WHAT COUNTY.

295. It is to be the nearest adjoining county free from the like exception, whether in the same or another circuit. (Code, 2839.) The Judge will ascertain by any evidence that may be satisfactory to him what adjoining county is free from or subject to the like exceptions.

RECORD TO BE SENT.

296. The Clerk is to copy from his minutes all the orders in the cause, and, among others, the order for a change of venue, and certify it to be a full and true copy, and envelop the transcript with the original papers, and deliver or send them "by messenger" to the Clerk of the Court to which the venue is changed. (Code, 2843.)

MAY BE CHANGED AGAIN

297. By,either party for subsequently arising causes. (Code. 2836.

History of a Law Suit p 180.

XVIII.

The counsel for plaintiff in error, on page 25 of his brief, suggests that I have been guilty of an impropriety in alluding to his client as "a rich and powerful corporation." I supposed that I had a right thus to allude to it because I find on reference to the Reports of the Court that it is a corporation chartered by the Legislature of Kentucky, and doing business in the States of Kentucky, Tennessee, Alabama, Mississippi, Louisiana and probably other states, traversed by its immense system of railroads. And speaking of corporations in geneaal, I find that this court in the case of Paul vs. Virginia, 8 Wall. 182 said:

"At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country, are to a great extent, conducted by them."

There is another reason why I thought I might venture to allude to his client as a "rich and powerful corporation," on page 29 of the record in the 3d assignment of errors, I find my client described as a "Street Arab." The record shows that he was a child six years old; and could neither

read nor write; the son of a widowed mother, a harum-scarum reckless child. I join my brother Baxter in invoking for his client "all the protection that can be afforded of the due process of law" as against this "Street Arab," and trust that I may have his hearty approval in the suggestion that it will be a sad day for the liberties of the people when one of the oldest landmarks of the constitution shall be swept away in order to shield a "rich and powerful corporation" from the verdict of three juries requiring it to pay for having mutilated and maimed for life a six year old child, "*A Street Arab.*"

I am at a loss to understand how the counsel for the plaintiff in error derives his authority for the statement found on the last page of his brief that he has information, "that two of the five members of the Supreme Court of Tennessee dissented on the question presented in this argument." I have no *information* on the subject outside of the record, and as a matter of fact know nothing of the truth of this information. I think, however, that I am warranted by the record in saying that the opinion of the Supreme Court of Tennessee was written for the palpable purpose of "catching" the jurisdiction of this court. I am unable to imagine any other reason which could have induced the court to say that there is "no" evidence to support the verdict. It is too clear for argument that if the court had said that the verdict is not supported by the evidence this court would not undertake to review the evidence.

I insist that the question of the weight of evidence or the *want* of evidence was not before the court; that the three jury trials had exhausted that branch of the case and that therefore the judgment of the Supreme Court so far as the *evidence* was concerned was *coram non judice.*

A. A. Freeman

IN THE

Supreme Court of the United States.

LOUISVILLE & NASHVILLE R. R. CO.,
vs.
EDDIE WOODSON, by next friend W, H. LEA.

No. 1182.
Error to the Supreme Court of Tennessee.

MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR AND TO AFFIRM UNDER RULE VI.

Brief for Defendant in Error.

The following opinion of the Supreme Court of Tennessee presents the sole question involved in this litigation:

"L. & N. R. R. Co.
vs.
EDDIE WOODSON, BY NEXT FRIEND W. H. LEA.

No. 1.
Haywood Law Docket.

This cause wes heard upon the transcript of the record from the Circuit Court of Haywood County, and the Court adjudges that there is no evidence to support the verdict of

the jury, but the defendant having obtained three verdicts of separate juries upon different trials, two of which have been heretofore set aside by the Circuit Judge, and now alone upon this ground, the statute of Tennessee, forbidding the granting of more than two new trials in the same cause, on the facts which statute is not in conflict with the Constitution of United States, 5th and 14th amendments, it is considered by this Court that said judgment be affirmed, and that defendant in error, Eddie Woodson, by W. H. Lea, as next friend, recover of the plaintiff in error, the Louisville and Nashville Rail Road Co., the sum of three thousand dollars ($3000.00), amount of judgment of Court below, and the costs of said Court, and of it and S. L. Chambers surety on appeal bond the further sum of one hundred and fifty-three and 50–100 dollars ($153.50), interest on said judgment from its rendition in the Court below to this time, together with the costs of the appeal, for which let execution issue."

The plaintiff in error assigns substantially the following grounds of error:

1st. Because it appears on the record that plaintiff in error did not owe the defendant in error. But that judgment was coerced by the statute; and that if the statute be enforced plaintiff will be deprived of its property without due proces of law.

2nd. Enforcement of the judgment will deprive plaintiff in error of its property without due process of law in violation of 5th and 1st sections of the 14th Amendment to the Constitution.

3rd. Because the effect of the statute is to deprive plaintiff in error of its property without due process of law and the statute was held to be valid and not opposed to the 5th or 1st section of the 14th Amendment.

4th. Because the statute is an encroachment of the legislative on the judicial branch of the government

5th. Because the statute on which this judgment is based is in violation of the nature and terms of the original social compact and beyond the limits of the nature and ends of legislative power, and is an apparent and flagrant abuse of such; and therefore, in violation of the Constitution of the United States, and null and void.

The statute, the constitutionality of which is attacked by plaintiff in error, is as follows:

"Not more than two new trials shall be granted to the "same party in any action at law; or upon the trial "by jury of an issue of fact in equity."

Act of 1801, chap. 6, sec. 59, Code of Tennessee, (Millikin & Vertrees), sec. 3835; Thompson & Steger, sec. 3132.

The Seventh Amendment of the Constitution of the United States declares that in trials at common law where the value exceeds twenty dollars the right of trial by jury shall be preserved.

Article 1st., section 6th of the Tennessee Bill of Rights declares "that the right of trial by jury shall remain inviolate," &c.

The right of trial by jury is the right of every citizen to have the facts involved in any litigation which he may have tried and determined by twelve good and lawful men." 4 Bax. (Tenn.) 180.

He has a right to have *twelve*.

5 Sneed (Tenn.) 561.

Apparently the derogation of this Constitutional right many of the States, including Tennessee, have provided by statute that the judge may set aside the verdict of a jury on

the ground that such verdict is not supported by the evidence.

Apparently in deference to this Constitutional right however the number of such new trials is limited. In Tennessee only *two* such new trials may be granted.

In view of the Constitutional provision that "the right of trial by jury shall remain inviolate," it is seriously questioned whether the legislature can vest in the judge the right to set aside the verdict of a jury on the *sole* ground that such verdict is not supported by the evidence.

Such a statute substitutes the opinon of the judge for that of the jury. It is the opinion of one man against that of twelve.

Such statutes however have remained in force in many of the States for a considerable period of time ; (that in Tennessee having been enacted in 1801) and it is not our purpose to question their valibility.

Were it otherwise it does not present a question over which the Court has jurisdiction.

Barron vs. Baltimore, 7 Pet. 248.

The contention of the plaintiff in error, however, is not that the law that authorizes the judge to over ride the verdict of a jury is unconstitutional, but that a law which *restricts* that right is so.

If the statute in question is unconstitutional because it *restricts* the court in the lawful exercise of a lawful power it follows that any number of new trials may be granted. Trial by jury ceases to be a *right*, but dwindles into a privilege to be enjoyed under the favor of the judge.

If the judge can *ad libitum* set aside verdict after verdict

until he gets a jury that coincides with him as the facts, he becomes to all intents the judge both as to the *facts* as well as the *law*.

The plaintiff in error insists that by the judgment of the Supreme Court of the State there was no evidence to sustain the verdict, and that therefore it is deprived of its property without due process of law.

This is a pure assumption.

Three juries had declared that there *was* sufficient evidence to sustain the verdict. The declaration of the Supreme Court that there was no evidence to sustain the verdict was an *obitur dictum*. The question of the weight of evidence, or want of evidence was not before the Court. That question had been settled, whether rightfully or wrongfully, it had been settled.

> "It is evident that it was the intention of those who "framed the law to put some limit to litigation. It is "urged by the appellee that the limit is, that if the "Court so orders the same party may have upon "showing good cause three trials, three verdicts, or "findings, but no more than two new trials shall be "granted to the same party in the same suit, litigation "or case."
>
> Roberts vs. Robeson, 22 Ind. 556.

But the plaintiff in error insists that the statute in question is a legislative encroachment on the judicial branch of the government.

The doctrine advanced seems to be that the legislature is not empowered to restrict the trial judge in his right to grant a new trial. This contention overlooks the fact that the jury is as much a part of the judicial system as the judge. The judge may correct his own mistakes as often as he commits them; or the appellate court may reverse him; but what be-

comes of the provision of the Constitution that the right of trial by jury shall remain inviolate if the judge may be empowered by law to set aside any number of verdicts on the sole ground that he does not agree with the jury as to the facts? For it must be remembered that this statute does not restrict the judge in his right to set aside a verdict—

1st. For error in the charge of the court.
2nd. For error in admitting evidence.
3rd. For misconduct of the jury.
4th. For other similar causes.

"The statute means that where the facts of a case have been fairly left to the jury on a proper charge of the court, and they have twice found a verdict for the same party, each of which has been set aside by the court, if the same party obtain another verdict in the like manner it shall not be disturbed."

10 Yerg. (Tenn.) 500
2 Swann, " 77
1 Hum. " 16
1 Head, " 169–171

The contention of the plaintiff in error places the prerogative of the judge on higher ground than that of a statute. That he is the absolute and final arbiter of the facts. That he possesses this power inherently. That it is beyond the control of the legislature. His fourth assignment of errors is that the statute is a legislative encroachment on the rights of the judiciary.

But this not a Federal question.

Admitting everything claimed by the plaintiff in error this Court has no jurisdiction. The mode of proceedure adopted by the legislature of a State to determine the rights of citizens does not raise a question which under the 25 section of the judicary act can be reviewed by this Court.

In the case of Walker vs. Sauvinet, 92 U. S., p. 92, the Chief Justice rendering the opinion, said

> "The States, so far as this (7th) amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings."
>
> Murrays Lessess vs. Hoboken. L. & J. Co., 18 How., 280.

"Due process of law, is process due according to the law of the land. This process in the States is regulated by the law of the State."

See also 21 Wall. 557; 7 Wall. 321; 7 Pet. 247.

Surely a statute which provides that a party may invoke the judgment of three juries of good and lawful men, is not a statute in contravention of that provision of the Constitution which declares that, "Nor shall any State deprive any person of life, liberty or property without due process of law," so far at least as respects the rights of the party against whom the three successive verdicts have been rendered.

If contrary to the spirit of our institutions (which favors a trial by jury), a party may be deprived of his property "by due process of law" without the intervention of a jury, (as it is shown in the case cited at the top of this page,) it is dificult to understand how a statute which clothes the citizen with the protection of *three* verdicts rendered by *three* juries, delivered in *each* case under proper instructions